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ABSTRACT

Twenty-eight articles focusing on non-adversarial approaches to resolving family disputes without formal court procedures are collected in this manual. The 16 articles in the first chapter discuss aspects of divorce mediation. These are followed by six papers in the second chapter on the mediation of family conflicts involving domestic violence and five papers in the third chapter on the resolution of disputes between parents and their children. While each article takes up a different topic, in general the manual has been designed to answer the following six questions: What is the state of the art of alternative family dispute resolution? How widespread is interest in these alternatives? What legal issues are raised by these new processes? How do the alternatives fit within the established system? What training is necessary? and, Which family disputes are amenable to these alternatives? Most of the articles were prepared by the faculty of the American Bar Association's National Conference on Alternative Family Dispute Resolution. Readers are invited to share with the editors their comments regarding the publication. (RH)

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ALTERNATIVE MEANS OF FAMILY DISPUTE RESOLUTION

The American Bar Association

Young Lawyers Division
National Legal Resource Center
for Child Advocacy and Protection

Special Committee on Alternative
Means of Dispute Resolution

Section of Family Law

Cover: Photograph by Mimi Forsyth

Edited by **Howard Davidson, Larry Ray, Robert Horowitz**

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PREFACE

The search for alternative methods of resolving disputes has burgeoned to "a movement." Several years ago, mediation was relatively unheard of in the family dispute arena. Today, this process is being scrutinised by family courts and practitioners throughout the nation. Hundreds of social workers, family therapists, and attorneys have taken mediation training. Scores of practitioners, court systems, and agencies offer mediation as a method to resolve family disputes. Recently, Chief Justice Burger in his "Annual Report on the State of the Judiciary" (January, 1982), urged the increased use and study of alternative methods such as mediation, conciliation, and arbitration in such matters as divorce, child custody, and adoptions.

Although there is a rapidly developing interest in alternative family dispute resolution processes, alternatives to formal court procedures have always existed in society. But the recent surge of interest seems to have at its foundation discontent with the present legal system in the sense of unnecessary costs and delays. Further, those involved with family disputes have become painfully aware that the adversarial approach may not always be appropriate to the resolution of these matters.

But what is the state of the art of alternative family dispute resolution? How widespread is this interest? What legal issues are raised by these new processes? How do the alternatives fit within the established system? What training is necessary? Which family disputes are amenable to these alternatives?

This book is designed to aid in answering these questions and is part of the American Bar Association's three year long range plan in the alternative dispute resolution field. In fact, ABA President David R. Brink has made alternative dispute resolution one of his top priorities this year.

Most of the articles in this book were prepared by the faculty of the ABA's National Conference on Alternative Family Dispute Resolution. This conference was co-sponsored by three ABA entities: The National Legal Resource Center for Child Advocacy and Protection (Young Lawyers Division); the Section of Family Law and the Special Committee on Alternative Means of Dispute Resolution. The manual is divided into three chapters: divorce mediation, domestic violence mediation and parent-child mediation.

Readers are invited to share with us their comments regarding this publication, and they are directed to the last few pages of the book which list other related ABA publications.

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Dispute Resolution

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CHAPTER ONE:

DIVORCE MEDIATION

Winning Through Mediation:

Divorce Without Losers*

Divorcing couples can now work out their own settlements with the aid of a professional mediator—minus the time, expense, and acrimony of the traditional adversary process. The mediation alternative shows promise for solving wider problems as well—from community controversies to international tensions.

by Patricia Vroom, Diane Fassett, and Rowan A. Wakefield

Until very recently, the most likely move for divorcing couples was for each to hire a lawyer and prepare for battle. Now, however, they have an alternative. Together, they can use the services of a new kind of professional—the family mediator.

The mediator can help them to negotiate an agreement about property distribution, support, and child custody by which they can both abide. Rather than acting as adversaries vying for the sympathy of a judge, the couple in mediation cooperates to solve their conflict. The result is a new, workable relationship in which both parties are winners, and the family continues in a transformed state.

Mediation is a conflict resolution process in which the disputants meet with a third-party mediator whose role is described variously as that of a facilitator of communication, an impartial guide to negotiation, a balancer of power, or a provider of perspective. This method differs from the traditional adversary process, be it the public judiciary or private arbitration, in several important ways.

Mediation is generally informal and less structured than either of the alternative procedures. Because mediation is private, it encourages an openness that is impossible in a public setting. The disputants retain control of the outcome rather than turning the decision-making power over to a judge or an arbitrator.

Resolving Family Conflicts

The use of the public adversary process to settle family conflicts runs counter to the basic concept of the family as a self-contained unit. Certain Eastern cultures and even some minority cultures in the United States, particularly the black community, strongly discourage recourse to the courts for resolution of family disputes. The reluctance to turn decision-making authority over to a stranger reflects the feeling that these disputes are private and should not be aired in public.

Many family disputes have been turned over to the courts, not because of a belief in the appropriateness of the adversary process, but because of the absence of other alternatives. Certainly, the diminishing role of such traditional mediating institutions as the church and the school has contributed to this trend.

Our society has consistently denigrated the divorcing couple. If a marriage has not worked, we have assigned blame and dealt out punishment. The adversary system is designed to accomplish that purpose. But as we come to realize that the reconstituted family is a natural adaptation to societal change, we should stop assigning blame and start assisting the parties in making the best of their situation.

Since, by its very nature, the legal profession does not offer emotional support, families in crisis have been turning increasingly to professionals outside the legal realm for assistance. The family therapy field has burgeoned in the last few years in response, but the stigma

*Reprinted with permission from The Futurist, Vol. XVI, No. 1

attached to therapy discourages some families from seeking such help.

Mediation is attractive because it is not saddled with the negative connotations of weakness or sickness often associated with therapy. Mediation clearly assigns responsibility to the disputants for working through their own conflicts. It is also attractive because it is both sensitive to emotional values and committed to a fair, just resolution of disputes. Unlike the adversary system, it is attuned to the future, to preserving the strengths of a relationship while moving past the conflicts.

O. J. Coogler, founder of the Family Mediation Association, sees mediation as a process of restructuring the family in crisis so it can move ahead by learning to communicate and deal with conflicts. As he puts it, "After a divorce, a couple is no longer husband and wife, but they are still mother and father to their children."

Its education function also sets mediation in stark contrast to the adversary process, which critics claim often weakens the parties and encourages their worst instincts. Mediation builds relationships, unlike the adversarial approach, which destroys them.

The Family in Transition

The family is clearly undergoing a major transition. Whether it is evolving or disintegrating is the subject of a lively national debate. What is certain is that the number and complexity of value clashes that result in conflicts along the whole family life cycle are increasing at an alarming rate.

The symptoms of transition are well known: the decline of the extended and nuclear families; the high divorce rate; the growing number of single-parent families; the increases in family violence, drug and alcohol abuse, teenage pregnancy, and suicide; and the growth of cults that replace the natural family. Paralleling these signs are the trends toward delayed marriage, dual career families, fewer children, single male or female-headed households, group living, and other experiments with new life-styles.

The causes, too, are becoming clear: inflation and the high cost of housing; the baby boom and the "graying of America"; unemployment, underemployment, and career uncertainties; television; affluence; the women's movement and sex role uncertainties; and the growth of the large government and service sector bueaucracies that are undermining the traditional mediating institutions of family, church, school, and community.

The emergence of the family mediation movement, with its ability to address constructively many of these conflicts and uncertainties along the whole life spectrum, is a promising sign at this critical time.

Judicial Overload

Over the years the judicial system has become the focus of dispute resolution, and the yearly increase in litigation of family and other conflicts has been tremendous. The number of lawyers in the U.S. has doubled since 1970. There are now 535,000 lawyers—one lawyer for every 410 Americans—and U.S. law schools continue to produce over 41,000 new lawyers per year. This phenomenal growth in the legal profession has had a significant impact on society at large.

The profession has grown in response to demand, but to some extent the availability of so many lawyers could be causing the increase in litigation. In Japan there are said to be more flower arrangers than lawyers. Not surprisingly, mediation is the major form of dispute resolution in Japan.

The past two decades have seen a new focus on "rights"—the Equal Rights Amendment, the right to choose vs. the right to life, the right to work vs. the right to organize. As soon as one identifies a right, one must develop a system for protecting that right—a factor that has contributed greatly to the overly-litigious nature of U.S. society.

The many painful experiences of those who have gone through the legal adversary process have fueled a strong interest in reform. The sheer crowding of the court dockets can also explain much of the interest in providing alternatives to the adversary process in family cases.

The caseload of America's family courts has grown exponentially. According to Doris Freed, a family law attorney, lecturer, author, and researcher for the American Bar Association, family court litigation doubled in the last decade. As a strong advocate of family mediation, she points out, "In New York, more than 50% of all civil cases filed are in the family court system, and I believe that in some states this represents as much as two-thirds of the civil caseload. That's why I think mediation is so great: couples who come to agreements with trained mediators rarely have to come back to court. It uncongests the court system."

State legislatures are beginning to recognize the value of mediation. Several states recently passed laws providing for mediation as an alternative to the court system. Most notably, California now mandates mediation in all child custody disputes.

Important forces are contributing to the current trend toward mediation in a less obvious way. State legislatures have made great strides toward modernizing family law. When the only grounds for divorce were fault-based, it was not possible to have the parties meet face to face and talk about compromise. The law demanded that unless one partner admitted to some wrongdoing, the marriage was indissoluble. The growing acceptance of no-fault divorce, now available in some form in 48 states, made possible the development of dispute resolution procedures that do not assign blame.

Meanwhile, certain legal presumptions have been eliminated in family law. Maternal preference in custody cases is no longer the rule, for instance. Under new legislative mandates, judges must determine subjectively what is "fair" or "best" for divorcing couples and their children. Since judges are trained to apply legal principles objectively to a fixed set of facts, this new mandate puts them in an untenable position. Many judges are thus outspoken advocates of mediation in the divorce setting because it allows all of the parties involved to determine the ultimate subjective solution.

Re-Humanizing the Process

The dozens of people who spoke with us about the new phenomenon of family mediation offered many explanations for the trend, but the unifying theme is the perception that mediation represents a fundamental change in the way Americans look at their institutions of justice, the family, and the resolution of personal problems. There is widespread agreement that we want and need to re-humanize our dispute resolution procedures and return responsibility for reaching solutions to those in conflict.

Court trials often become battles between experts arguing the validity of their professional views, with an emphasis on credentials rather than appropriate solutions to a family's unique problems. The mediation movement gains momentum from the public's rejection of the over-involvement of "experts" in their lives.

Even the experts are demanding release from the trap that they partially set for themselves. They have witnessed too many cases decided arbitrarily on the basis of their judgments, and they do not like the feeling of having so much power over other people's lives. Many of these psychologists and psychiatrists are in the forefront of the family mediation movement.

Ann Gaybrick and Diane Bryner, Virginia Court psychologist and

About this Article

This article which appeared in the February, 1982, issue of the *Futurist*, was condensed from the original, written as a feature in the *American Family's* Special Issue on "Family Mediation, Wave of the Future?" published in October, 1981. The *American Family*, now in its 5th year of publication, is the national newsletter on family and public policy. This Special Issue on Mediation gives an overview of the burgeoning field of family mediation, including separate brief pieces on highlights of legislation, research, programs, publications, organizations and meetings in the mediation field. Periodic coverage of the changing family mediation field continues in *American Family*.

This Special Issue was researched, edited and published by *American Family*, a non-profit corporation, in cooperation with the Family Mediation Assn., 9308 Bulls Run Parkway, Bethesda, MD, 20817. AMERICAN FAMILY, Inc. is now associated with the National Center for Family Studies in Washington, D.C. where it is helping to establish a National Clearinghouse on Family Policy and Programs.

A grant from the William and Flora Hewlett Foundation helped to make the publication of this Mediation issue possible.

The *Futurist*, a journal of forecasts, trends and ideas about the future, is published monthly by the World Future Society, 4916 St. Elmo Ave., Bethesda, MD, 20814.

Copies of this *American Family* Special Issue are available at a cost of $6.00 from AMERICAN FAMILY, Cardinal Station, Washington, D.C. 20064, (202) 635-6087.

New York mediator John M. Haynes makes a point during a family mediation session. The mediator plays the role of an impartial go-between as he facilitates communication between the disputants and guides their negotiations toward a fair solution.

> **"The mediation movement gains momentum from the public's rejection of the over-involvement of 'experts' in their lives."**

counselor, respectively, are two such experts. "About a year ago," says Gaybrick, "we decided that we weren't really helping our clients. So, we trained with the Family Mediation Association and then set up a mediation project in the courthouse. We persuaded the judges to order parties to attend at least one orientation session when we could explain the differences between mediation and the adversary process."

Since September 1980, Gaybrick and Bryner have mediated 51 disputes concerning child custody and support cases. Forty-two percent were mediated successfully, 12% reconciled, and 24% took no further court action of any kind after the orientation session. Only 22% went on to litigate their family disputes. Gaybrick concludes: "Those couples who use the adversary process are more likely to have their battle continue for years because there isn't the resolution of their conflicts that results from mediation. Most lengthy custody fights have nothing to do with the kids. In mediation, we can help a couple recognize and work through the emotional issues that are preventing them from reaching a custody decision. This means that the couple ends up saving time, money, and grief."

Past and Present

Americans have not always turned to the courts to solve their family disputes. In the past, the extended family itself was the primary mediating institution. The church has long played an important part in helping families deal with internal conflict. The local parish priest, minister, or rabbi was frequently called upon to talk to warring couples and help them learn to live with each other. School teachers or friends in the community often intervened in disputes between parents and their delinquent children.

The Vera Institute of Justice has traced the existence of family mediation in this country to the mid-nineteenth century, when Chinese immigrants set up the Chinese Benevolent Association to resolve disputes in their community by mediation. The American Jewish community established its own forum for mediation, the Jewish Conciliation Board, in 1920. Both cultures had a long and successful history of using mediation in resolving internal disputes, but the immediate motivation for the formation of these organizations was the failure of the American judicial system to provide fair treatment for their people.

The Ford Foundation and the William Flora Hewlett Foundation have taken leadership roles in a consortium of foundations and corporations in establishing a major new center for the study and support of alternative dispute resolution. Endowed with $10 million for its first five years, the National Institute for Dispute Resolution began operation late last year.

In 1980, the U.S. Congress passed the Dispute Resolution Act, calling for the establishment of alternative dispute resolution mechanisms nationwide to be administered by the Justice Department. Although the act has not yet been funded, its very existence lends policy support to the growing mediation movement.

"The passage of the act was a real triumph," says William Pendleton of the Ford Foundation. "For the first time, Congress has officially recognized two things: one, the need to make alternative dispute resolution services available on a large scale; and two, that since mediation of disputes is financially self-sustaining only in the divorce field, the government should support mediation services, as it has done in the labor area for years."

The U.S. Department of Health and Human Services is funding a three-year project to evaluate the effectiveness and efficiency of mediation nationwide.

Growing National Support

Many other national organizations have begun to focus on mediation during the last five years. The American Bar Association established a Special Committee on Alternative Means of Dispute Resolution in 1976. This committee has been instrumental in encouraging new court-related mediation programs around the country, guided by the concept of a "multi-door courthouse." This concept was endorsed by ABA president David R. Brink in an address at the ABA annual meeting last August:

> One of the principal, unsatisfied demands made of lawyers is for prompt and economical resolution of disputes. The "multi-door dispute resolution center" is a kind of dream where any citizen with a legal prob-

Mediation Along the Family Life Cycle

Pre-Marital Mediation
Mediators are helping couples draw up marriage agreements prior to the ceremony. This "ounce of prevention" can help to insure a more stable marriage.

Disabled and Handicapped
Stress often occurs in families caring for disabled or handicapped members. Counselors are using mediation to resolve some of the resulting conflicts.

Teenage Pregnancy
Struggles often arise over situations involving unmarried pregnant teenagers. Mediation can assist in resolving the conflicts between the parents and child.

Homosexuals
Gay couples ending a relationship often have many of the same conflicts that married couples do when they divorce. The legal system does not necessarily provide a forum for their disputes, so mediation can be valuable in resolving disputes over child custody, joint real estate ventures, and future support payments.

Unmarried Cohabitants
At least one campus mediation service handles disputes between non-married couples who live together and seek a solution other than separation.

lem can have that problem diagnosed and then be referred to either a lawyer, a traditional court, a small claims court, a mediation center, or a private or public agency that can solve that person's problem. This will promote a new image of lawyers. They will be seen as counselors, problem solvers, and deliverers of prompt, appropriate, and affordable justice.

The Federal Mediation and Conciliation Service was founded in 1947 to promote peace in the labor area by training and supplying mediators. Recently this agency has become involved in the support of family mediation by providing technical assistance to community family mediation centers.

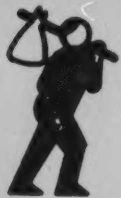
The National Peace Academy Campaign was endorsed by Congress in 1978. The campaign promotes peace between nations through the development of an academy of higher learning devoted to training people from all over the world in mediation techniques. This organization has grown from 3,000 to 10,000 members in the past six months. Executive director Milton Mapes envisions an academy that would train individuals to mediate all types of disputes, including family conflicts.

Who Will Be the Mediators?

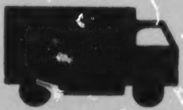
There is a great deal of uncertainty about who will be the family mediators of the future. To some extent, this will be determined by who gets there first with the best service. With the creation of a new profession, turf questions will inevitably arise.

Various associations have made different assumptions about the background and skills required for the practice of mediation. The Family Mediation Association regards the profession as a new discipline drawing on the insights of the legal and mental-health professions. The majority of their members come equipped with a degree in psychology, family therapy, social work, or law, which is not surprising, since mediation is a process that utilizes the attitudes and skills developed by these professions. Since the number of lawyers and social workers exceeds the de-

Teenagers and Parents
Numerous conflicts arise between parents and their adolescent children. Parent-teenager disputes often involve power struggles, and mediation can help restore relative peace to these households.

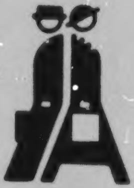


Runaways
Mediation is being used to bring together runaways and their families, and to resolve their conflicts out of court. Mediators are also helping to resolve family differences caused by juvenile drug abusers.



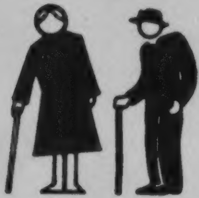
Relocation
New comprehensive relocation services use mediation to resolve the conflicts brought to the surface by a family move, such as problems related to dual careers, care of dependents, adolescent anxieties, and general emotional problems.

Domestic Violence
Mediation is helpful in the area of spouse abuse, particularly with first-time abusers.



Separation and Divorce
Property settlements and support payments are often the two areas of greatest contention in separation and divorce disputes. Mediation helps the couple to separate emotional issues from financial decisions.

Custody and Visitation
Mediation allows for more flexible and finely tailored child custody arrangements than those resulting from the adversarial process. Couples often reach cooperative joint custody agreements.



Retirement
Mediation services can help settle disputes at retirement time, such as when a husband might want to move to Florida just when his wife is embarking on a new career.

The Elderly vs. Their Middle-Aged Children
With the elderly population increasing, more and more conflicts are arising when older people can no longer care for themselves. Mediators help families to reach decisions about institutional versus home care.

Wills and Estate Planning
Mediation is useful when families disagree over estate plans. It also cuts costs when family members are contesting the execution of a relative's will.

"Will this more humane and less costly method of conflict resolution expand to community problems, and ultimately to national and international disputes?"

mand for their services, economic motivation clearly plays a role in their attraction to this new field.

The American Bar Association takes the position that lawyers are the appropriate mediators in court-related programs. The Association of Family Conciliation Courts, on the other hand, primarily trains behavioral scientists drawn from the ranks of court personnel.

The National Center for Collaborative Planning and Community Services in Watertown, Massachusetts, has been giving intensive mediation training workshops for three years. The Center trains anyone who is willing to devote an intensive 40-60 hours to the study of both the theory and practice of negotiation and mediation. The course leads to certification from the center.

Founder and co-director William Lincoln believes strongly that mediator certification is necessary and needs to be nationally coordinated. "I'm worried about the situation where people can go out and hang up a shingle and call themselves mediators," he says. "It's bad for the clients, and it's bad for the profession. We need standards and competency, and certification helps achieve those things."

The American Arbitration Association, which is planning to step up its own work in the provision of family mediation services and training, has yet another perspective. According to its president, Robert Coulson, "We don't want to see family mediation become another profession, with all the bureaucratic red tape and unnecessary restraints of state licensing and certification. We should welcome the diversity which is emerging as many agencies, organizations, and individuals become involved in offering mediation services, especially the many individuals in neighborhood centers who have taught themselves to be impartial helpers."

Simulated divorce mediation scene. The couple concentrates on solutions, not recriminations, as they talk things out and try to reach an agreement with the help of the mediator.

Mediation—An Expanding Role?

Is family mediation an "idea whose time has come?" Family mediation is one of the most rapidly growing movements in the country today.

Why is this happening? Perhaps mediation's growth parallels society's search for a new sense of community where the healthy survival of the family, in whatever form, takes precedence over the search for individual satisfaction. Or perhaps the exponential growth of litigation in recent years has pushed society too far in thrusting the intimate concerns of the family into the public arena. Whatever the reasons, there is growing acceptance that family mediation resolves family conflicts in a sensitive manner and restores decision-making to the family itself.

Will this process become the solid foundation on which broader methods of conflict resolution might be built? Will this more humane and less costly method of conflict resolution expand to community problems, and ultimately to national and international disputes?

Many forms of conflict resolution work well at times. Mediation clearly offers no panacea. But its astonishing growth in the last five years merits serious attention. A peaceful technique that promotes a cooperative sharing of power, culminating in a transformed—but not severed—relationship, shows great potential for settling disputes at all levels.

About the Authors

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Submitted for
the American Bar Association's
National Conference on
Alternative Family Dispute Resolution

DIVORCE MEDIATION -- A WORKABLE ALTERNATIVE

by
H. Jay Folberg

Divorce mediation is a process that recognizes marital dissolution as both a matter of the heart and of the law. It appears to be a promising alternative that may benefit family members and decrease the burden on the courts by resolving many cases that can be diverted to this more benign and less costly procedure. The very elements that provide the advantages of divorce mediation over the adversarial model also create substantial questions relating to protection of legal rights and fairness. This paper examines the rationale of divorce mediation and the issues it poses.

This paper, originally prepared for the International Society on Family Law, is excerpted from a more comprehensive work in progress being written by the author with the support of the Divorce Mediation Research Project funded by the U.S. Department of Health and Human Services and by The Best Interests of Children and Families Project of the Family Impact Seminar. A copy of or citation to the comprehensive work from which this was taken, along with the footnotes here omitted, may be obtained from the author at Lewis and Clark Law School, Portland, Oregon 97219.

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DIVORCE MEDIATION -- A WORKABLE ALTERNATIVE

H. Jay Folberg

INTRODUCTION

The dramatic increase in the divorce rate during the past two decades has been accompanied by sweeping changes in the substantive law of divorce. The most significant of these substantive legal reforms has been the almost universal acceptance in the United States of some form of no-fault divorce. The decision to end a marriage, in most states, is now essentially a matter of private choice. There have, however, been few changes in the procedural law of divorce. Our judicial system, with its complement of lawyers, counselors and experts continues to intervene in divorce with the same shell of procedural mechanisms that existed prior to the no-fault revolution. The increased number of divorce cases, coupled with the growing acceptance of divorce as a common life event, has raised serious questions about the appropriateness of judicial intervention and its accompanying adversarial process in all marital dissolution situations.

Divorce mediation, coupled with procedural reforms, has been proposed as an alternative to traditional judicial intervention and divorce litigation. It appears to be a rapidly developing trend as it is increasingly recognized that divorce does not necessarily end family relationships, but may require their restructuring in a way that better meets new needs while protecting the rights of family members. This paper will explore the alternative of divorce mediation and examine the promise it holds as well as the issues it poses.

I. WHAT IS DIVORCE MEDIATION?

The first question to be addressed in policy discussions about family mediation is: What is it? The practice of family mediation falls along a spectrum which defies a restricted definition. What family mediation is will be dependent in part on what is being mediated, who is doing the mediating and the setting in which the mediation is offered. This paper will focus on divorce mediation -- mediation of the incidents attached to the dissolution of a family relationship. The subjects of divorce mediation include, but are not limited to, those that would be resolved by a judge in court, but for the mediated settlement. It can thus be seen as an alternative or, at least, a compliment to the court process. Divorce mediation is defined here as a non-therapeutic process by which the parties together, with the assistance of a neutral resource person or persons, attempt to systematically isolate points of agreement and disagreement, explore alternatives and consider compromises for the purpose of reaching a consensual settlement of issues relating to their divorce or separation. Mediation is a process of conflict resolution and management that gives back to the parties the responsibility for making their own decisions about their own lives. It is usually conducted in private without the presence of the parties' attorneys. It has identifiable stages and divisible tasks, but no universal pattern.

In order to better distinguish and isolate mediation from other interventions, we might look at what it is not. It is not, as above defined, a therapeutic process. Participation in mediation may or may not have a therapeutic effect on the parties, but it is not designed as a traditional therapeutic process. It is not focused on insight to personal conflict or in changing historically set personality patterns. It is much more an interactive process than an interpsychic one. Mediation is task-directed and goal-oriented. It looks at resolution and results between the parties rather than the internalized causes of conflict behavior. It discourages dependence on the professional provider rather than promoting it. Though some approaches to therapy can make similar claims, therapy in any mode is a form of treatment, which mediation is not.

Mediation is not arbitration. In arbitration, the parties authorize a neutral third person or persons to decide upon a binding resolution of the issues. The process used in arbitration is adjudicatory, but is typically less formal than that utilized in court and is usually conducted in private. Other than its informality and privacy, arbitration is much like the judicial process, except the "judge" is chosen or agreed upon by the parties and derives his or her authority from the agreement to arbitrate. In mediation the parties may choose the mediator, but do not authorize the mediator to make the decisions for them. Arbitration may follow mediation, either as a separate proceeding or as part of the same "med-arb" process.

Mediation is not the same as traditional negotiation of divorce disputes. Negotiation is generally a "sounding out" process to aid dispute resolutions but is not accomplished through any established framework and may be pursued through representatives, most often attorneys. Negotiation does not normally utilize a neutral resource person and is premised on an adversary model. Private negotiation may, however, precede mediation, follow unsuccessful mediation, or in some settings go on simultaneously.

Mediation is not conciliation, though the two terms are often used interchangeably. The two can be distinguished by looking at their historical development and application to the field of family law. California first offered court-connected conciliation services in 1939. The initial focus of these services was on providing marriage counseling aimed at effecting a reconciliation of spouses. With the adoption of no-fault divorce and the increase in the divorce rate, the focus of conciliation has shifted from marriage counseling aimed at reconciling parties to separation counseling and evaluation services for purposes of assisting the domestic relations judges in making child custody and visitation orders. Indeed, in California, where mandatory custody mediation is usually performed by conciliation personnel, the distinction between conciliation and mediation has become somewhat obfuscated. Though private mediation may encompass financial and property issues, about which more will be discussed later, court connected mediation rarely attempts to directly resolve money or property distribution matters. Conciliation is by practice and tradition limited to personal issues of custody and parental relationships among family members. That is not to say that conciliation staffs could not provide mediation services leading to a written resolution of all divorce issues.

II. THE RATIONALE OF DIVORCE MEDIATION

Divorce is both a legal event and part of a family process. It is a matter of the heart and of the law. The strong emotional forces accompanying the dissolution of an existing family relationship argue for more delicately wrought measures than could be provided in a court imposed solution. Mediation can educate the parties about each other's needs and provide a personalized model for dispute resolution, both now and in the future should circumstances change or differences arise. It can help them learn to work together, isolate the issues to be decided and see that through cooperation all can make positive gains.

This advantage of mediation exists, in part, because mediation is less bound by rules of procedure and substantive law, as well as certain assumptions or norms, that dominate the adversary process. The ultimate authority in mediation belongs to the parties themselves and they may fashion a unique solution that will work for them without being strictly governed by precedent nor concerned with the precedent they may set for others. They may, with the help of the mediator, appropriately consider a comprehensive mix of their needs, interests and whatever else they deem relevant regardless of rules of evidence or strict adherence to substantive law. Unlike the adjudicatory process, the emphasis is not on who is right or who is wrong or who wins and who loses, but rather upon establishing a workable solution and resolution that best meets the family's own unique needs. Mediation is conducted in private, so that private matters may be discussed without becoming part of a public record.

Family mediation furthers the policy of minimum state intervention. The argument for minimum state intervention has been most eloquently made by Goldstein, Freud and Solnit relative to determinations of child care and custody in their book, Before the Best Interests of the Child. Parents should be presumed to have the capacity, authority and responsibility to determine and do what is best for their children as well as what is best for their entire family constellation, regardless of how it may be rearranged following divorce. Psychological theory, as well as constitutional considerations, argue for parental autonomy and family privacy when there is no direct evidence that the interests of children are jeopardized in the process. Parents should have the first opportunity to meet the needs of their children and continue the maintenance of family ties without state interference.

A policy that provides parents with the option of mediation to facilitate their own decision-making and encourages self-determination should enhance continuing family ties and reassert the dignity and importance of the family as a self-governing unit. One of the most noble functions of law is to serve as a model of what is expected. Family law and procedure, instead of providing a model, is too often used coercively to supplant family self-determination upon inadequate evidence that the personal and societal cost of such interventions are absolutely required.

The legal system is not well able to supervise or enforce the fragile and complex interpersonal relationships between family members that continue even after most divorces. Once the state intrudes into the decision-making role of parents, the family process is less likely to function independently in the future and continued state involvement and individual non-cooperation with imposed orders is likely. By definition, a consensual agreement, whether reached through mediation or direct negotiation, reflects the parties' own preferences and will be more acceptable over time than one imposed by a court. In the process of mediation, the parties formulate their own agreement and emotionally invest in its success so they are more likely to support its terms in the long run than one negotiated or ordered by others. The lack of self-determination in adversary proceedings is a suspect consideration accounting for never-ending divorce litigation surrounding family conflicts where post-divorce skirmishes in court may exceed the intensity of the initial divorce dispute. Not only do imposed judicial determinations of custody serve as the antithesis of the ancient concept of harmonious relationships, but judicial intervention also contradicts the current emphasis on individual freedom and minimum state coercion.

If the arguments are strong for minimal state intervention in the parent-child relationship upon divorce, they would appear even more persuasive as to allowing the parties to privately decide their own economic relationship upon the dissolution of the marriage. Divorcing parties should be free to contract between themselves and encouraged to do so. The state should use its increasingly precious resources to intervene in economic relationships between adults only as a last alternative when all efforts for private ordering or settlement have failed.

Robert Mnookin and Lewis Kornhauser have made a significant contribution to our thinking about private ordering in their article entitled "Bargaining in the Shadow of the Law: The Case of Divorce." In their article they identify the four distributional questions that must be decided in divorce cases: (1) marital property, (2) spousal support, (3) child support, and (4) child custody and visitation. They argue that divorce is now largely a matter of private concern and divorcing parties, themselves, should negotiate a settlement of these questions with minimal state intrusion, but "against a backdrop of fair standards" determined by the state through its legislative and judicial processes. State statutes and appellate decisions now provide some guidelines or norms for divorce distributional questions, but they are seldom fashioned with "private ordering" as their goal and generally require legal help to interpret and apply them. Mediators can facilitate private ordering in divorce and other family disputes by providing common information to the parties on applicable legal norms and principles, as well as the probable outcome in court if the case is litigated.

Preliminary studies on the effects of mediation, while primarily limited to custody cases, indicate that the theoretical promises of mediation are indeed real and measurable.

Divorcing parents are likely to reach agreement concerning custody whether they choose mediation as an alternative to the adversarial process or are compelled to use it before being heard in court, and they are generally pleased with the process. The data is encouraging in substantiating that divorcing parties who mediate, rather than negotiate or litigate through the adversarial process, are far less likely to bring post-divorce disputes into the legal system. The cost and time studies have produced mixed results, but do generally indicate that mediation offers the promise of saving time and money for both the state and the parties.

III. ISSUES RELATING TO DIVORCE MEDIATION

The very elements that make divorce mediation so appealing and provide its advantages over the adversarial model also create its dangers and raise substantial issues not yet resolved. Because mediation distinguishes itself as an approach that recognizes divorce and family disputes as both matters of the heart and of the law, there exists an issue of how emotional feelings are to be weighed against and blended with legal rights and obligations and just what are appropriate subjects for mediation. Because mediation is conducted in private and is less hemmed-in by rules of procedure, substantive law, and precedent, there will remain the continuing question of whether the process is fair and the terms of a mediated agreement are just. This concern for a just and fair result has particular applicability to the provisions for custody and child support in recognition that the mediated bargaining occurs between parents and that children are rarely present during mediation nor independently represented.

Because mediation represents an "alternative" to the adversarial system, it lacks the precise and perfected checks and balances that are the principal benefit of the adversary process. The purposeful "a - lega " character of mediation creates a constant risk of overreaching and dominance by the more knowledgeable, powerful or less emotional party. Some argue that the "a-legal" character of divorce mediation requires all the more careful court scrutiny before mediated agreements are approved and incorporated into a decree. Others argue that if the parties have utilized mediation to reach agreement, there is no need for the expense, delay, and imposition of a judge's values that are inherent features of the judicial review process.

Because family mediation is a new practice which crosses traditional professional boundaries and recognizes divorce as a family process within a legal context, there are likely to be questions about interdisciplinary cooperation and struggles for turf and assertions of professional dominance through claims of right, experience or unique expertise. Mental health professionals, attorneys and judges may not eagerly cooperate in creating joint roles nor in relinquishing their traditional roles during tight economic times in what is viewed as a growth industry. They may, however, become strange bedfellows in checking the emergence of a new "profession" of family mediators. Because family mediation does involve professionals in a new or hybrid role with few established rules and where fairness is a central concern, delicate issues of professional restraint and ethics will persist for some time without refined and tested answers.

Because there is wide public dissatisfaction with the present application of the adversary process to divorce cases and no cle[illegible] direction from the legal profession for the improvement or replacement of that process, there will surely be exaggerated claims and expectations for mediation, which some will herald as a panacea rather than a promising and rational alternative with its own set of problems and no magic answers. Some will insist that it be mandated in all divorce cases, others will argue that it must always be voluntary. Naive, if not zealous, enthusiasm may create disappointment and frustration that could thwart long-term innovations and improvements. Only some of these issues can be discussed below; all are analyzed in the more comprehensive writing from which this paper is excerpted.

A. The Role of the Courts

The intriguing question has been raised of whether the courts should play any role when a mediated settlement is reached (or for that matter, when a non-mediated settlement is agreed upon). Our clogged family law dockets, as well as the expense and delay of judicial review when agreement exists, argue for some way to eliminate this judicial holdover from the era of fault-based divorce grounds. A stronger argument against this largely anachromistic judicial function is the preference for family self-determination and the reaffirmation of parental responsibility for the welfare of their children. The elimination of routine judicial review of divorce settlement agreements may enhance the ability of the courts to better fulfill their necessary role where unresolved controversy between divorcing spouses exists or when enforcement of settlement provisions is required.

Perhaps the current practice of court review of settlement agreements, particularly mediated agreements, is so cursory that there would be little factual difference between current realities and the reforms to be suggested here except for their underlying premises and the important role expectations they convey. Court review implies court power to change parental decisions and impose the decision of a judge in all cases. Mnookin and Kornhauser argue that divorce settlement agreements determining issues of money and children, within a broad range of acceptable norms, should not be reviewed by courts and need go through no judicial process. They do not, however, indicate a precise mechanism for determining which settlement agreements fall within acceptable norms in the absence of routine judicial review in all cases. They refer in a footnote to mediation as one alternative. The goal, which mediation may satisfy, is to weed out unconscionable agreements or those that fall outside of acceptable norms without requiring all divorcing couples to use the existing judicial process and unreasonably burdening the courts by maintaining a review task so large as to result in cursory or fictional scrutiny.

Arbitration decisions are now enforceable in many states without judicial review, pursuant to arbitration legislation. Legislation or court rules could encourage mediated settlements by exempting from court review divorce agreements reached through a "bona fide" mediation process or, at least, providing a judicial fast track for divorce agreements procedurally certified by a mediator. This approach, in distinguishing mediated divorce agreements from settlements reached by other than mediation, raises its own set of issues as to an acceptable definition of "bona fide" mediation, the qualifications of a mediator with certifying authority, and the justification for distinguishing mediated settlements from settlement agreements reached by the parties without a mediator, but space does not permit their discussion here.

Eliminating routine judicial review of mediated divorce settlement agreements would not entirely remove the courts from the divorce process. We know that some cases cannot be settled or mediated. There must be a fair and credible forum with procedural safeguards and rules to assure the peaceful resolution of disputes for the parties who are unwilling or unable to make cooperative decisions or recognize the benefits that may come from a less coercive process. The threat of court litigation, with all of the human and material expense that it requires, may be the very element that will help some parties cut through their egocentric near-sightedness to see that their self-interests, as well as the interest of the family, may be promoted through mediation rather than a court fight. If we can draw any parallel, the advent and legislative encouragement of collective bargaining in the labor management field did not eliminate the strike. Rather, the strike looms in the background of most collective bargaining as a guiding motivation to utilize the less coercive process as a way to achieve a more lasting and mutually beneficial resolution of very real differences.

The success of divorce mediation may be dependent upon the very existence of the courts and the potential for litigation. Mediation works best when guidelines exist as to how the law would be applied to resolve the dispute. Legislation is not precise enough to resolve the myriad of factual situations and differences that can exist when families attempt to disentangle their affairs. The courts, by creating precedents of how similar issues have been judicially resolved in the past, creates the framework by which mediators provide information about legal norms and offer remedies that have been adopted by courts following research and expert input that may not be readily available in mediated cases. As previously discussed, mediation is but another of the informal processes that might take place in "the shadow of the law."

Preliminary studies reveal that divorce mediation works most effectively when there is some time pressure on both parties to reach settlement. Because the parties to divorce are seldom in the same phase of adjustment and mutuality about the dissolution, one party may be less motivated than the other to bring the mediation to a conclusion. When the parties are referred to mediation by the court and must operate within the court's time frame or when the parties are in private mediation knowing that the filing of papers by either party may impose time limitations on the process, mediation can best achieve its task-oriented goal of bringing closure to a settlement of the issues. If the courts did not exist to set these time parameters and precedents, it is not clear that it could be done as effectively through any other mechanism.

B. Fairness

Suggesting the elimination of judicial review of mediated divorce agreements requires further inquiry about the issue of fairness. In considering whether mediated settlements will be fair and just, we must ask "compared to what?" We know that the great majority of divorce cases in the United States currently go by default in which one party fails to appear. The default may be a result of ignorance, guilt or a total sense of powerlessness. The default may also be a result of an agreement between the parties on the distributional questions eliminating the need for an appearance. The question persists in our present dispute resolution system of whether such agreements are the result of unequal bargaining power due to different levels of experience, patterns of dominence, the greater emotional need of one divorcing party to get out of the marriage or a greater desire on the part of one of the parties to avoid the expense and uncertainty of litigation. The present "adversarial" approach does not require the adverse parties to be represented nor does it impose a mediator or "audience" to point out these imbalances and assure that they are recognized by the parties, as mediation should attempt to do. Pro-se divorce is increasingly popular and sanctioned by our present system in which there need be no professional intervention prior to court review. Mediation, at least, provides a knowledgeable third party to help the couple evaluate their relative positions so that they may make reasoned decisions with minimal judicial intrusion.

The most common pattern of legal representation in divorce is for one party to retain an attorney for advice and preparation of the documents. The other party will often negotiate directly with the moving party's attorney or retain an attorney to do so without filing an appearance. If a second attorney has not been retained by the non-moving party prior to preparation of the settlement agreement or proposed decree containg settlement terms, then the unrepresented party will often consult with an attorney to determine if the proposed settlement is "fair enough" not to contest and if all necessary items have been covered or discussed. Basically the reviewing attorney serves as a check to assure that all major items have been covered in the agreement or, at least, considered by the parties. Then the reviewing attorney informs the client of any other options to the suggested terms and whether the points of agreement fall within acceptable legal norms. These norms are often raised in the context of what would be the likely range of court outcome if agreement was not reached. The likelihood of a different court outcome than the proposed agreement is weighed against the financial. time and emotional expenses of further negotiation or litigation.

A similar pattern of independent legal consultation could, and should, be utilized for review of mediated agreements. Current mediation practice, influenced by ethical restraints, is to urge or require that each divorcing party seek independent legal counsel to review the proposed agreement before it is signed. Many mediators encourage the parties to consult independent legal counsel during the course of mediation. Though the criteria for independent attorney review of the proposed mediated agreement is not clear, the purpose of the review is no less clear than it is under the present "fair enough" practice. Given that the initial mediated agreement is formed with the assistance of a neutral person rather than someone ethically bound to advance the interest of one party, independent legal review by an attorney for one spouse pursuant to a "fair enough" standard should assure at least as great a fairness safeguard as the common reality of our present adversary system. When both parties to the mediation obtain independent legal review, as they are encouraged to do, then there is a double-check of what is fair enough. In some complex cases, other professional review, such as that of a CPA, may be necessary for still another opinion and double-check.

The mediator may have a professional responsibility to advise both parties as to whether the agreement reached is fair within the parameters of possible court resolutions. The responsibilities of a mediator on this point have not yet been resolved legally or ethically. In Lange v. Marshall, one of the first reported malpractice cases brought against a lawyer-mediator, the wife claimed that the mediated settlement was inadequate and that the attorney-mediator failed to adequately protect her interest in obtaining a better settlement from her husband. The lawyer conceded that he did not advise her regarding her rights and did not attempt to get the "best" settlement for her because these were not appropriate functions for a mediator. Although the Missouri Appellate Court did not reach the question of the appropriate responsibilities of a lawyer-mediator, in that it ruled the plaintiff suffered no damages, the case illustrates that a spouse may later question the fairness of a mediated settlement and seek redress against the mediator for a perceived bargaining disadvantage. Court review of mediated agreements as an incident to malpractice cases cannot be expected to refine standards of fairness in any systematic fashion that would serve as a helpful guide. Perhaps allowing direct attack to reform "unconscionable" or manisfestly unjust divorce settlements would provide more of a caselaw standard, but this too has its problems and limits.

Another voiced concern about the fairness aspect of mediation is that mediation implies for some a process only of compromise, where each party is necessarily urged to move toward a center position. It must be recognized that some demands and expectations that divide families are so insane or productive of harm or evil, whether by design or emotional blindness, that no compromise should be made toward their realization. The mediator should be prepared, if necessary, to facilitate the recognition of this possibility and not hide behind the easy rubric that all positions can be compromised. Though most positions are subject to reasonable compromise, some things cannot and should not be compromised. This potential problem might be minimized if mediation is recognized in its proper role as a process of conflict resolution and management, rather than a form of magic to make a conflict disappear never to be seen again. Mediation may produce better, but not always happy, results and agreement will not be produced in every case.

Mediation, unlike litigation, may appropriately recognize the collision of legal norms with "person-oriented norms." These personal norms or standards, though not legally valid in court, may be important to the parties in reaching a fair settlement within the context of the emotional issues and characteristics involved in divorce disputes. The accommodation of these colliding norms may produce an agreement no less "principled" for the parties than a litigated result decided only on accepted legal norms or principles. For example, a personal norm that considers fault relevant to the financial outcome may be accommodated in mediation, even though this principal is no longer legally relevant in the courts of many states. If it is relevant in accommodating the parties' personal principals, knowing that fault would not be considered in court, can it be said that the resulting settlement is less "principled?" The accommodation of these nonlegal principals is one of the very advantages of private ordering facilitated by mediation that may make the settlement more acceptable and lasting for the divorcing parties. The contrast of mediation with litigation, in considering a larger universe of norms and principles and in being more open-ended than court proceedings, is not an indictment, but only a distinction.

C. Protection of Children

When the divorce does involve minor children, some would argue that the state has an interest beyond the efficient and speedy private settlement of the dispute between the parents. The state, however, under the well-developed doctrine of parens patriae has a responsibility for the welfare of children only when parents cannot agree or cannot adequately provide for them. Divorce mediation begins with the premise that parents love their children and are best able to decide how, within their resources, the children can best be cared for. The arguments for parental determination of a child's best interest have been concisely articulated by Mnookin and Kornhauser and by Goldstein, Freud and Solnit, who in their book, Before the Best Interests of the Child, assert that court review of parental agreements on child custody is not justified by our desire to protect children. They propose that the interests of children would be better served by allowing separating parents to choose to have their agreement "officially recorded to assure that it be recognized for tax or other non-custodial purposes."

Court review, as previously stated, implies court power to change parental decisions and impose the decision of a judge. When both parents love their children and are willing to utilize a process of mediation to agree on how to provide for them after divorce, it does appear presumptious and insulting to impose a third party, whether a judge or a child development expert, to determine if the parents' custody, support and care agreement is good enough for their own children. A mediated agreement of the parents about their childrens' custody, support and care is much more likely than a judicial decision to match the parents' capacity and desires with the child's needs. Whether the parents' decision is the result of reasoned analysis or is influenced by depression, guilt, spite or selfishness, it is preferable to an imposed decision that is more likely to impede cooperation and stability for the child. In any event, a resolution, negotiated by attorneys, reviewed by a court or litigated before a court, is no more likely than a mediated settlement to disclose which outcomes are the result of depression, spite, guilt or selfishness. Even if one were to assume that mediated settlements may produce some errors or mistakes relative to the child, there is no reason to think that the process of mediation would produce any more mistakes than the existing adversarial system. Indeed, a professionally directed process with the very goal of cooperative assessment of needs and abilities to reach a consensual and personalized parenting plan for the children would appear far less likely to produce error than an adversarial process that leaves one parent a winner and one the loser.

It is important not to lose sight of the increasingly evident truism that parents are primarily responsible for the day-to-day care of their children and that the state cannot provide the love, attention and care for a child that can be provided by even marginal parents. Nor can the state require parents to love their children. All the state is really capable of doing is supervising children of neglectful or abusive parents and, through its laws, policies and procedures, establishing a model of what is expected of parents. One of the primary expectations that we should have for all parents is that they be responsible for deciding upon the care of their children without relying on the state for their personalized decisions. Mediation is a process designed to enhance that parental responsibility.

The mediator should refrain from trying to second-guess parents or telling them what is "right." The principal protection that the mediator can offer the child is to see that the parents are considering all factors that can be developed between them relative to the child's needs and their abilities to meet those needs. The mediator should be prepared to ask probing and difficult questions and to help inform the parents of available alternatives. The mediator's ethical commitment, however, is to the process of parental self-determination and not to any given outcome. When asked who in the process is protecting the interest of the child, the answer must be the parents -- as is their role. Mediation can assist the parents in carefully considering how that role can best be fulfilled.

D. Money vs. Kids

If divorce mediation is a good idea whose time has come, its benefits may be needlessly restricted by focusing the mediation process, particularly in court settings, on only child custody issues and leaving resolution of the financial issues to a different process. Division between these aspects of divorce is only superficially separable because they are inextricably intertwined.

Issues of support, both spousal and child, cannot be decided in a vacuum. Financial issues are part and parcel of the decisions on who incurs the daily expenses for the child and who sets aside the time necessary to care for the child. It has been observed that each parent may, within a given range, "exchange custodial rights and obligations for income or wealth," and that support duties may be tied to custodial prerogatives as one way to enforce economic rights without going to court. As much as we would like to romanticize parenting and separate children's needs from the financial needs of parents, we know that custody and the attendant financial arrangements represent some trade offs in the minds of divorcing parties that we can only pretend to keep separate.

E. Property Division

Mediation should, ideally, encompass division of property and conclude with a written settlement document. Dividing the property can serve as a vehicle through which the intense feelings associated with the marital breakdown can be played out. Parties may, in the process of dividing property, attempt to redress every imbalance believed to be perpetrated by the other. In the typical adversary process, the property settlement negotiation can be manipulated as a psychological defense against the deeper and more painful feelings associated with marital loss. To the extent that property settlement is viewed as a strictly legal and logical exercise, it supports manipulation and may retard opportunities for emotional resolution between the parties.

In mediation, whether by a counselor or an attorney, the property settlement should be viewed as a vehicle for finishing and bringing closure to the relationship. It might be considered a ritual signifying the ending of a marriage: It is emotionally symbolic as well as legally and factually important. As each detail is negotiated, struggled over, or conceded, there is a simultaneous, if unconscious, emotional shifting regarding the approaching reality of the divorce.

The process by which the financial aspects of the marriage are brought to a close can be as important as the settlement document itself. Viewed in this way, the importance of the document is no more supreme than the cooperative process that produces it. Signing the property settlement agreement can become for the parties a mechanism for providing a ritualistic ending of the divorce that might otherwise be lacking in the mediation process, should there be no court hearing. It is not really surprising that the signing of the mediated settlement agreement is often accompanied by tears.

F. Who Should Serve as Mediators

As with the exploration and establishment of any new territory, there are grave risks that there will be struggles for turf. The problem, as stated earlier, is that divorce occurs both within the family system and within the legal system. Clinicians working in the area of divorce are concerned with family processes and decisions which move the parties through the emotional morass and adjustment to divorce and with the psychological barriers inhibiting their openness in communication. Lawyers working in the area of divorce must focus on the restructuring of the family's more visible or practical concerns: property division, support issues and custody arrangements. Marital and divorce therapists are accustomed to working with multiple parties and looking at individuals in relation to each other as members of a family. A lawyer, on the other hand, by training and ethical constraints, is accustomed to responding to the legal needs of an individual and in championing the cause of an individual, rather than the well-being of the entire family constellation.

There are many types of professionals, and perhaps some non-professionals, who can legitimately offer different models of family mediation services so that clients may have a choice of providers. Therapists, counselors and other caring and sensitive people familiar with the divorce process can master the basic procedural and substantive legal knowledge necessary to help couples explore options and make choices that are then subject to drafting and review by the parties' attorneys and possibly by the court. We know, however, that some couples will not seek legal review, even if urged to do so by the mediator. If legal review is sought, it may be difficult for the clients to accept and act on proposed changes once they have emotionally accepted the mediated resolution. There will surely be questions within the bar of whether a non-lawyer mediator has crossed over the line and offered legal advice. These concerns and questions from attorneys should not obscure the obvious fact that decisions about who can best assist them in resolving family issues belong to the family members. Lawyers may be well advised to avoid the appearance of professional selfishness and vanity, while only persuading ourselves that our singular objective is the public good.

Mental health professionals are no less possessive in guarding their turf than are attorneys. Clinicians see them-

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selves as uniquely qualified to move the parties through the psychological barriers inhibiting their openness and communication toward reaching agreement. Many therapists believe that only they can help the parties understand the underlying and even unconscious reasons for the marital breakdown adequately to deal with the issues surrounding divorce; that they alone can help deal with the ambivalence or non-mutuality around the decision to part. Some will claim that a clinician is necessary to help resolve the feelings of personal loss and grief as parties resolve the feelings of emotional attachment to one another. Attorneys, it is claimed, are self-selected by aptitude and training to deal with cold hard facts and logic rather than feelings, which are a necessary part of every divorce dispute.

It is submitted that lawyers can and should be offering their services as divorce mediators. Lawyers, by aptitude and training, are problem solvers who deal daily in their practices with the creative exploration of compromise alternatives. They are skilled at sorting through issues to isolate points of agreement from disagreement for purposes of suggesting settlement solutions. Attorneys, in the course of their practices, regularly help clients predict the consequences of various choices as well as interpret legal guidelines derived from cases and statutes so that clients can make knowing and intelligent decisions. One of the principal roles of a mediator is to help balance power by equalizing information concerning the law and financial issues. Lawyers are in a unique position to equalize bargaining positions, since the less informed spouse is more vulnerable to intimidation, or perceives him or herself to be disadvantaged.

A lawyer, as mediator, can review the issues to be addressed, the range of resolution that might be imposed in a court setting, and the options available for a negotiated settlement. The lawyer as mediator would serve as neither party's advocate. Rather, both parties could rely on the lawyer's legal expertise and experience with the understanding that full disclosure and a review of all the issues and options will lead to more informed and, presumably, more satisfactory choices. Attorneys are particularly accustomed to negotiation and should be able to help facilitate assessment and negotiation by divorcing parties.

Mediation is a task-oriented process -- the product of that task being a settlement agreement. Attorneys are in the business of drafting settlement agreements and explaining their terms.

The argument that attorneys lack listening skills necessary for mediation, or that they are not adept at providing empathetic responses to facilitate discussion, also falls short of the truth. Any attorney who has successfully tried a jury case must be skilled at listening as well as talking and at picking up nonverbal clues as well as spoken ones. An attorney's first task in any case is to effectively interview clients for the purpose of establishing trust and rapport in order to obtain all the facts and learn of the client's feelings and wishes.

Some cases will be psychologically complex and beyond the competence of an attorney. The attorney must know his or her limits and when to refer particularly difficult matters to others

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with special training, but this is no different than other similar situations faced by professionals whose clients' problems defy categorization. Divorce mediation may represent a new role for attorneys, requiring qualities of sensitivity and skills of faciliation which they can, with some effort, master. If attorneys don't provide mediation services, the void will be filled entirely by others and the public will have fewer meaningful choices.

G. Interdisciplinary Co-Mediation Teams

Interdisciplinary co-mediation teams present the most flexible approach in relation to a theory of divorce mediation which stresses the interplay of emotional resolution with the comprehensive legal settlement task. Both team mediators must adapt to a role different from traditional lawyering and different from the practice of psychotherapy. While the lawyer's intervention focuses on the factual aspect of the settlement issues, the therapist focuses on the interpersonal and emotional aspects. The therapist manages the therapeutic milieu and in that regard is attentive to issues of trust, fear and safety. The lawyer provides information about the legal system and establishes legal parameters and guidelines for the mediation.

The co-mediation team provides a number of important benefits. First, the interdisciplinary presence makes an important statement to the couple that recognizes the complex fusion of legal, emotional and economic issues and together provides competency to help explore and untangle the issues. The co-mediation aspect of the team permits a great deal of flexibility in responding to the comlex interfacing of emotional and legal issues that permit the continuous choice of psychological or legal task-oriented interventions. The interdisciplinary presence also provides a sense of safety to a party who might be fearful of an emotional disadvantage or to a party who is fearful of a disadvantage due to a lack of information about finances or the law.

Second, a male/female team can provide a model of autonomous and independent behavior as an example of how a couple can work together with mutual respect. Balancing the male/female members provides an opportunity to be understood, validated or challenged by persons of both sexes, thereby minimizing sexual stereotyping and triangling. Transference issues are less likely to be played out in a way which creates difficulties in the relationship with one mediator when the other is free to comment and keep the process moving. Neither of the parties can project onto a single mediator behavior reflective of the psychological issues alive for them as part of the marital breakdown. Trust, power, fairness and the behavior of the opposite sex are, as we know, very sensitive issues for the parties during adjustment to divorce.

Finally, flexibility is greatly enhanced with two mediators. It is possible for one mediator to be more actively confrontive or supportive with a co-mediator capable of intervening and responding on the other side of the issue. It is difficult to always be "up" as a mediator, a lawyer or a therapist. Co-mediation allows for division of labor as well as collegial support, perception checks, continual cross-training, and the benefits of cross-disciplinary expertise. The skills of therapists in facilitating communication and unblocking emotional obstacles, when coupled with the assessment skills and informational resources of the lawyer, enhances the likelihood of a comprehensive negotiated settlement.

IV. CONCLUSION

Divorce mediation has been touted as a replacement for the adversary system and a way of making divorce less painful. Though it may serve as an alternative for those that choose to use it, it is neither a panacea that will create love where there is hate, nor will it totally eliminate the role of the adversary system in divorce. It may, however, reduce acrimony by promoting cooperation and it may lessen the burden of the courts in deciding many cases that can be diverted to less hostile and costly procedures. Divorce mediation does appear to be a rational alternative attracting considerable interest. It is still in its infancy in the United States and, therefore, along with its promises, it has raised substantial issues. The resolution of these issues will require additional empirical research, experience and dialogue. This paper has been offered to help explore the promise of family mediation, frame the initial issues and stimulate the dialogue.

THE EMOTIONAL CONTEXT OF DIVORCE: IMPLICATIONS FOR MEDIATION

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Divorcing couples come to mediation with their personal and economic lives on the line. They come at a time when feelings of anger, guilt and failure run high. And they come with established patterns of reacting to each other. An understanding of these factors helps the mediator develop strategies to ensure a successful outcome of the mediation process.

Mediation generally takes place early in the process of divorce, close to the time of the separation. It is the period during which feelings are most polarized. separation is the event which more than any other marks the end of the marriage. At this point multiple changes (both actual and symbolic) are made. Each member of the family experiences stress in coping with these changes. If the separation has not yet occurred, anticipation of the unknown adds to the level of tension.

Each spouse goes through a very distinct emotional process in coming to terms with the end of the marriage. Although the process is somewhat similar for the initiator and the non-initiator, the two spouses are out of phase with each other. (See Figure 1). The initiator, who is in control of the timing of the separation, has also had the opportunity to do much of the "grief work" prior to the separation. This involves coming to terms with the loss of one's hopes for the relationship, as well as the loss of the relationship itself. Feelings of anger, guilt, and helplessness predominate during the grief process, and it is difficult to attend to anything else.

The non-initiator spends the time prior to separation denying the impending separation or trying to find ways to prevent it. While the initiator often finds some relief in the separation, the non-initiator is hit with a "double-whammy". This person must deal with all the logistical and economic changes accruing from separation and must also begin dealing with rejection and grief. The non-initiator who is having difficulty accepting the reality of the separation, may comment that "she'll come to her senses," "she really doesn't mean this," or "he's always come back before, so I'll just wait him out." Once the non-initiator acknowledges the separation, that person begins grieving (or occasionally denies the grief for a time and later falls apart).

Signs of grieving include tears, anger, depression, and the like. The non-initiator usually evidences these behaviors in mediation. Additional anger comes from the non-initiator's resentment of the initiator's control of the decision to separate and its timing. When a third party is involved, feelings of anger and grief may be expressed even more strongly.

Mediation may be therapeutic, but it is not therapy. The task of mediation is to make all the decisions about children, about money and property, and about all the other issues pertaining to the "business of marriage". The therapeutic aspect of the mediation process is the process itself. Spouses learn that in spite of their feelings toward each other, they can make decisions, they can cooperate with each other. This is a secondary gain: a significant one, but secondary to the decision-making task.

The therapist-mediator, particularly the marital therapist, is used to dealing with strong feelings. In mediation this can be an advantage, but there are some serious pitfalls. Interventions designed to help the spouses understand their negative reactions to each other, as in therapy, can distract from the task at hand in mediation. Focusing on tears may give the message that if one is in pain one is excused from the work of negotiating. It may be that lawyer-mediators, who are not trained to focus on feelings, find it somewhat easier to stay out of these traps. However there is the tendency to go to the opposite extreme and ignore or "shush" any negative feelings. It is when the mediator understands and accepts such feelings that she or he is best able to develop strategies that will defuse the hot spots and keep the couple on track.

In addition to managing the stress associated with separation, mediators must deal with the established interaction patterns of the couple. With some couples for example, one spouse has been the spokesperson for years, while the other's role is to agree (or at least not to effectively disagree). This pattern must be changed to one in which each spouse speaks for his or herself for mediation to be successful.

Other common patterns that are problematical in mediation have as much to do with unresolved issues from the past as they do with the present. The long-term issues are not going to be resolved in mediation, nor should they be. The mediator however, needs to recognize the patterns so as to defuse and/or work around them.

A distinct advantage for the therapist-mediator is prior experience in changing the communication patterns of couples - an extremely useful skill in mediation.
Thomas W. Blume who has several years of mediation experience at the Divorce and Marital Stress Clinic believes that this is the most important skill that therapists bring to mediation.

Couples like Frank and Louise often choose to mediate. Louise is hurt and angry at Frank, who has left for another woman. She frequently becomes teary in the sessions, wants to justify every detail of what she asks for, and wants to know (and share her feelings) about all the hurtful things Frank has done. Frank sits passively and says little, which makes Louise even angrier. The mediator's work is cut out in this situation. Maintaining control of the session is the first task. Not only does the mediator need to feel in control, but the couple need the safety provided by knowing the mediator is in control. To a certain extent the mediator needs to be traffic cop, establishing the rules for who speaks when, and enforcing them. This must be done in a manner which lets Louise know her anger and pain are understood and accepted, but which does not permit a discussion of these feelings. At the same time, the mediator is going to have to push Frank into the negotiation. Each will need to be encouraged to take responsibility for identifying and communicating their specific needs. The mediator needs to teach them how to make "I statements", and to reframe and restate issues using non-inflammatory words. It will be important to give positive feedback to both Frank and Louise when they are making efforts to change their communication style to one of true negotiation and cooperation. If Louise is so preoccupied with her grief that she is unable to focus, the mediator should consider referring her for therapy. In addition, slowing the mediation process down by scheduling appointments further apart, may allow Louise to move beyond the depths of her grief.

John and Linda expressed a great deal of anxiety early in mediation. They questioned whether there was a solution for their financial problems. They had not yet separated, and some of the anxiety was about that upcoming event. When questioned, it became apparent that neither of them had much information about separation and divorce, and that this was the basis for much of their anxiety. The mediator provided a more thorough description of the legal process, and information about the many options available. He encouraged them to brainstorm all possible options, and gave them the homework assignment of getting an appraisal of their house. He also suggested additional reading on the financial aspects of separation and divorce. The anxiety was successfully dealt with, without ever discussing it.

Custody issues are commonly loaded with feelings - more feelings than can possibly pertain to the situation. So it was with Donna and Bill. Although each felt the other was a good parent, each wanted sole custody. No matter what aspect of parenting was the focus, it got derailed, and the discussion repeatedly returned to an insistence on sole custody. The real issues were Donna and Bill's leftover feelings about power and control, which made it hard for them to trust each other. Donna felt she'd been passive all too long, and that by getting sole custody, she could make Bill acknowledge that she had some power. Bill was afraid that Donna might leave the area and take the children with her. The mediator here needs to focus on a win/win framework. The concerns about trust can be acknowledged, and can be shared. The emphasis however needs to be on helping both of them see that the other spouse's needs have to be met in order for their own to be.

When parents feel guilty about their parenting or about the separation they may try to overcompensate by wanting to do everything for the child. Anticipatory work in regard to the parent's future needs for time alone and time to socialize with adults is helpful, as is information about children of divorce and single parenting. The mediator can also make suggestions for helping the children through the separation process.

There are some couples who put up road blocks to any decisions. This is often a sign of ambivalence about the marriage. To check this out, "go with" the road block. Ask them to explain the difficulty so you can fully understand it. In the process of explaining they may become clearer about their ambivalence, or if the mediator hears a great deal of ambivalence about the separation, a referral for marital therapy may be appropriate.

Occasionally one or both spouses get stuck on an emotional issue and need therapy to get beyond it before completing the mediation process. A husband who begins to express the belief that the Army is out to get him needs to be referred for therapy. Collaboration with the therapist will prove helpful to both processes in the long run.

The mediation process is a difficult one. People need rewards in order to keep working at it. To obtain rewards, the tasks must be manageable. Breaking down the tasks into small steps that only require small decisions is essential, as is arranging the agenda so that some small decisions are made early. These decisions are themselves rewarding. In addition, the mediator can offer positive strokes for efforts to stay focused on the task, for taking responsibility for one's statements and requests, and for efforts to find ways to cooperate. Additional support is provided by ideas and suggestions that the mediator offers around the particular issue. For example, if there is to be a long distance relationship with children, parents usually welcome ideas about how to keep that relationship alive and intimate.

Mediators need to be clear on their own boundaries and limitations. It is particularly important for the mediator to know in what ways they are most likely to be "seduced" across their boundaries by the couple, so that they guard against it happening. When it does happen, as it will, the mediator needs to recognize his or her own feelings that indicate there is a problem with the process. Mediation always involves a lot of pushing and pulling of the mediator by both spouses. Making it a point to always see the spouses together prevents some of the seduction.

Therapist-mediators tend to err in the direction of doing therapy to too large an extent, and thus are more easily sidetracked from the task. Moreover, when the mediator acts as therapist, it increases the possibility of taking sides or at least being perceived as taking sides. It is very important to keep the therapy separate by referring to another therapist, no matter how interesting the case and how much they like you and would like you to be their therapist.

Attorney-mediators are less likely to recognize cues indicating emotional issues. When they do they may not know what type of problem is involved, whether they should refer, or who to refer to. The attorney-mediator may find it useful to have a therapist as a consultant, if he or she is not familiar with the emotional aspects of divorce or with the mental health community. When referring, it is important to know who is good in working with specific problems. For example, not all therapists work with couples, and some that do can't handle a really angry couple.Not all mediators can handle an angry couple either. Here again it is important to be aware of your own limitations: don't agree to work with couples that push your emotional buttons.

The mediator is in a unique position to offer help to divorcing families. The mediator plays the key role in facilitating a cooperative process between the spouses at a critical time in their lives. In addition, the mediator is the person in a position to spot problem areas and can refer the family members to other appropriate sources of help. He or she can also draw on the expertise of other professionals for the client's benefit.

The mediator who stays in the role of mediator offers the best possible service to the divorcing couple. Overall, well done mediation is in and of itself therapeutic.

FIGURE 1

STEPS IN THE EMOTIONAL PROCESS OF DIVORCE

Initiator		Non-Initiator	
Deny problems / possibility of split Consider possibility of seperation Anger and blame Loss, grief, helplessness Guilt and failure Detachment Decision	Decision-Making Phase	Deny problems / possibility of split	1 to 2 years
Seperation	**End of Marriage**	**Seperation**	
Cope with massive change in living patterns	Marriage Still Primary Reference Point	Acknowledge fact of seperation Anger and blame Loss, grief and helplessness Guilt and failure Manage day-to-day activities Implement small decisions	6 to 9 months
Develop new social relationships Explore new opportunities and challenges Understand marital breakdown, including own contribution Accept responsibility for own actions Reassess values and needs Set long-term goals Develop autonomy	Marriage Not Primary Reference Point	Develop new social relationships Accept seperation / divorce Explore new opportunities and challenges Understand marital breakdown including own contribution Accept responsibility for own actions Reassess values and needs Set long-term goals Develop autonomy.	18 to 24 months minimum

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DIVORCE MEDIATION: STRENGTHS AND WEAKNESSES OVER TIME

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DIVORCE MEDIATION RESEARCH PROJECT

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Trends in Family Litigation

In the past decade, the incidence of marital separation and divorce has increased dramatically. For example, in the single year of 1979 there were nearly 1.2 million divorces affecting over two million adults and nearly 1.5 million children (Glick, 1979; National Center for Health Statistics, 1980). Demographers project that over 40% of current marriages will end in divorce (Preston, 1975).

One result of the upsurge in divorce is that the court is overwhelmed by the demand being made upon it. Over half of the cases filed in all trial courts of original jurisdictions are concerned with matrimonial actions (Corey and Teachout, 1979; Cotchett, 1978; Feldman, 1977). Approximately 10% of divorce cases go on to full scale legal battles over custody (Foster and Freed, 1980). Many court systems are so overbooked that waits of 9 to 10 months are common for no-fault divorces and contested divorces often have to wait for a year or two to be scheduled (Mnookin and Kornhauser, 1979).

Court congestion is not the only problem with the adversarial system. Many feel it is simply inappropriate when applied to the resolution of marital disputes. According to one writer, the adversarial model increases trauma and escalates conflict (Bohannon, 1970). Another writer argues that the adversarial system encourages "dog and cat fights" that run counter to the best interests of the child (Buttenwieser, et al., 1966). Lawyers are accused of being poorly trained to deal with the psychological aspects of divorce (Kallner, 1977) and encouraging their clients to take extreme positions that are unnecessarily divisive (Cavenaugh and Rhode, 1976). Judicial proceedings are criticized for failing to address unresolved feelings about the marriage and separation that often precipitate custody conflicts in the first place (Milne, 1979). Others feel that adversarial interventions foster low commitment to the eventual agreement (Macaulay and Walster, 1977), and fail to enhance the cooperative, communication and problem-solving skills of the parties (Herman, McHenry and Weber, 1979). Still others fault the coercive nature of adjudication (Felstiner, 1974) as well as the 'twin dragons' of cost and delay (Kaufman, 1976).

The Mediation Alternative

Mediation is a participatory and consensual process in which a third party - the mediator - encourages the disputants to find a mutually agreeable settlement by helping them to identify the issues, reduce misunderstandings, vent emotions, clarify priorities, find points of agreement, explore new areas of compromise, and ultimately negotiate an agreement. Rooted in African moots, socialist comrades' courts, psychotherapy and labor mediation rather than Anglo-American jurisprudence, mediation stresses informality, open and direct communication, reinforcement of positive bonds and avoidance of blame (Gulliver, 1979). A 'cooperative' dispute resolution process (Rubin and Brown, 1975; Deutsch, 1973), its central purpose is to:

> reorient the parties toward each other not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will direct their attention toward one another (Fuller, 1971:305).

The benefits attributed to mediation are far-reaching. When compared to the adversarial system, it is believed to be more expeditious, inexpensive, private, procedurally reasonable and amenable to truth-finding and the complete airing of grievances. Supposedly, it is able to deal with the causes of problems, reduce the alienation of the litigant, and lead to the development of satisfying agreements that are perceived as fair and acceptable over time. Further, unlike adjudication, mediation presumably aids disputing parties in resuming workable relationships with one another (Buttenwieser, et al., 1966; Cavenaugh and Rhode, 1976; Danzig and Lowy, 1975; Goldbeck, 1975; Mund, 1976; Spencer and Zammit, 1976; Mnookin and Kornhauser, 1979; Witty, 1980; Felstiner and Williams, 1978).

Family mediation supporters contend that the process will enhance the adjustment of children following separation and divorce by promoting parental cooperation, reinforcing parent-child bonds and encouraging visitation. For example, Wallerstein and Kelly (1980) found that while 37% of the children in their study were "moderately to severely depressed" five years following the separation, the children who were doing best enjoyed easy access to the non-custodial parent and a post-divorce relationship that was relatively conflict free.

Finally, mediation proponents contend that the process will improve the dismal child support payment performance of fathers following divorce. Numerous accounts indicate that non-compliance with child support orders is at epidemic proportions (Espenshade, 1979; Cassetty, 1978; Weitzman, 1977; Carrad, 1977). Mediation promises to improve the situation, by reducing the anger, feelings of loss, sense of injustice and separation from their children that many divorcing fathers experience. In the words of researchers who have compared the adjudication and mediation of numerous small claims matters, including unpaid bills:

> People are more likely to feel bound by an obligation they have undertaken voluntarily and more or less publicly than one imposed upon them in a court of law...Perhaps merely facing one's opponent for a time, having the opportunity to speak with, and to hear him or her humanizes and personalizes the process enough to affect the defendant's attitude toward payment. (McEwen & Maiman, 1981:264)

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Not surprisingly, there has been a tremendous growth in the popularity of non-adversarial approaches to marital dispute resolution. Various writers have urged Family Courts or social service agencies to establish mediation or conciliation counseling services (Weiss, 1975; Davidson, 1975; Weiss and Collada, 1977), and courts in 13 states have followed suit. Private mediation services have sprung up around the country and a number of practitioners have developed and published model approaches to divorce meditiation (Coogler, 1978; Haynes, 1981; Milne, 1978; Irving, 1980). Finally, judges, lawyers and mental health professionals have become increasingly interested in this new area of practice.

Despite its growing popularity and use, there have been few studies to empirically assess mediation. Many theoretical and practical issues have yet to be addressed. The following is a systematic exploration of the long and short term consequences of resolving custody and visitation disputes using traditional adversarial approaches and mediation. The analysis attempts to provide answers to the practical questions of whether mediation works and how it compared with adjudication.

Research Format

The information presented here was collected as part of the Denver Custody Mediation Project. Begun in March, 1979 and sponsored by the Piton Foundation of Colorado and the Colorado Bar Association, the Project involves the organization and administration of cost-free mediation services to divorcing couples in the Denver metropolitan area and the evaluation of the mediation process and its outcome. The Project employs a rigorous, quasi-experimental design. As a result, it provides an excellent opportunity to examine the consequences of mediating child custody and visitation disputes, and to compare this process to the traditional adversarial system (Pearson, 1979).

In order to generate a sample of contested child custody and visitation cases, setting clerks, referees, judges, investigators and attorneys in two metropolitan judicial districts identified and referred to the Project all suspected cases of contested custody or visitation. Once referred, cases were randomly assigned to mediation or control groups.

Consenting individuals in our control group were interviewed at three points in time: as soon as they filed court documents indicating they disagreed about custody and visitation matters; soon after the court promulgated final orders regarding custody or visitation; and again, six to twelve months later. All interviews were conducted over the telephone. Each one took approximately 20-40 minutes to complete.

Individuals in our experimental group were offered free mediation services. Mediation was described as a method of resolving disputes in an informal setting with the help of a neutral third party. Interested couples were typically assigned to male-female teams comprised of lawyers and mental health professionals who had been trained in mediation techniques. They were interviewed four times: prior to the commencement of mediation; immediately after the conclusion of mediation; soon after the court promulgated final orders regarding custody or visitation; and again, six to twelve months later.

About half the disputants offered free mediation services rejected the offer. Although this surprised us, we have since discovered that refusals are common in all mediation programs. For example, Davis (1980) reported that 32% of those referred to the Brooklyn Dispute Resolution Center failed to appear and another 12% refused mediation outright.

The Neighborhood Justice Centers reported attritrion rates of as high as 60% (Cook, *et al.*, 1980). These patterns may reflect the unfamiliarity of the general public with the mediation concept and/or the antipathy many disputants feel toward the prospect of cooperating with their adversaries.

Rather than merely dispensing with uninterested individuals, we chose to include them in the study as a "rejecting group". They were interviewed on three occasions: as soon as they rejected the offer to mediate; soon after the court promulgated final orders regarding custody/visitation; and again six to twelve months later.

The present paper considers some of the effects of mediation and adversarial interventions on individuals with similar disputes. Not all follow up interviews have been completed to date. Thus, the analysis of short term effects is based on interviews with 125 mediation clients, 63 individuals in the adversarial control group and 95 individuals who rejected mediation and also used the adversarial process. Longer term effects are based on interviews with 92 mediation clients, 50 individuals in the control groups, and 74 individuals who rejected mediation.

Short Term Effects

Our analysis focuses on the effects of mediation and adjudication on six types of attitudes or behaviors at two points in time. The first time point occurs two or three months after the promulgation of court orders. The attitudes and behaviors we consider are: 1) agreement making; 2) satisfaction; 3) compliance and relitigation; 4) relationship with a former spouse; 5) effects on parent-child interactions and 6) savings in time and money.

1. Agreement Making

Mediation inspires agreements and inter-party stipulations. The

Project agreement rate currently stands at 58%. However, a majority (65%) of the Project's clients who fail to produce an agreement in mediation go on to generate stipulations prior to their court hearings. By contrast, half of the individuals in the adversarial samples who were never exposed to the mediation process stipulate before reaching court, and half rely upon a judicial determination.

Viewed from another angle, 80% of those exposed to mediation produce their own custody and visitation agreement, either during or after the process. Only 20% turn to the court for a solution. However, 50% of those never exposed to mediation rely on the court for a decision. Successful mediation clients are also more likely to feel they can resolve their post-decree problems without resorting to court. Forty percent thought they could work out agreements with their spouses. Only 22% expected to use attorneys and the courts. By contrast, approximately 70% of the adversarial samples and the unsuccessful mediation clients expected to go back to court to make needed changes.

2. Satisfaction

Mediation generates a lot of user satisfaction. More than two-thirds of successful mediation clients said they were "highly satisfied" and 93% would mediate again in the future or recommend the process to a friend. Although unsuccessful mediation clients were less enthusiastic, 81% would recommend it to a friend.

Mediation clients also tend to be satisfied with their final agreements, decrees and court orders. Regardless of outcome, about 70% of those who tried the process reported that they are satisfied with the agreements they finally obtained. In contrast, about 56% of individuals in the reject and control groups are happy with the terms of their final orders. More than half the individuals who successfully mediated reported the decision making process as fair, see both parties as equally influential in determining the outcome, and describe their decrees as complete and thorough. In contrast, one-fifth of the respondents in the unsuccessful mediation, reject and control-group samples who stipulated before their court hearing described their stipulations as "perfectly fair."

3. Compliance and Litigation

Individuals who succeeded in mediation appeared to be least likely to have problems with their agreements and to engage in relitigation. At the time of the first follow up contact no successful mediation client had filed a motion for modification, and reports of temporary restraining orders in effect were also less frequent (15% versus 30%).

Spousal compliance with the decree was also more common among successful mediation clients. Fully 66% of the successful mediation clients reported that their spouse was in compliance. The rest of the groups reported compliance at about half that rate; i.e., in about 30 to 45% of the cases.

Finally, with the exception of the successful mediation clients, between 30 and 40% of all respondents reported that serious disagreements had already arisen with the decree at the first follow up interview. Among those who successfully mediated, only 13% reported such problems.

4. Spousal Relations

Whether or not it results in an agreement, individuals typically reported that mediation helped them to better understand and communicate with an ex-spouse. For example, in the first follow up interview, 70% of those who produced agreements in mediation and 31% of those who tried but failed, felt that mediation had helped them to better communicate with an ex-spouse. Not surprisingly, few (14%) of those respondents exposed only to the court system reported improved communications as a result of the adversarial process.

Similarly, 47 and 24% of successful and unsuccessful mediation clients, respectively, reported that the process helped them to better understand an ex-spouse. This was reported by only ten percent of those relying entirely on the courts. As one respondent noted, "You can't go to court and be civil, whether its your nature or not."

Overall, when asked to describe their current relationship with an ex-spouse, about 80% of the successful clients described their relationships as no worse than "strained". Such responses were given by 50% of the unsuccessful clients and about 43% of these never exposed to mediation.

There are several reasons why mediation clients perceive their relationship with an ex-spouse to be improved. The process encourages communication. In addition, it avoids competitive strategies and polarized outcomes. As one mediation client observed about the process: "there were no winners or losers, good guys or bad guys -- we could do what was best for everybody."

5. Consequences for Parents and Children

There is a definite difference in the types of custody and visitation arrangements produced in mediation and the adversary system. Fully seventy percent of those who produced agreements in mediation opted for joint legal custody. Only 20% called for traditional, mother-only custody awards. Joint custody characterized less than 15% of non-mediated agreements.

It is worth noting that many joint custody arrangements in the Project are more conventional than the label implies. Only 27% of the agreements in the Project call for the regular alternation of the child between parents. More typically, our joint custody agreements recognize that both parents are fit and have legal responsibility for the care and upbringing of the children while delegating day-to-day care of the children to the mother. The joint custody designation, however, is very important to parents. For example, one father felt that "without joint custody I never would have been able to enjoy parenting. It's striking how nurturing I can be as a man." And even where children reside primarily with the mother, fathers typically receive liberal and generous visitation. On the average, children whose parents work out visitation plans in mediation see their non-custodial parents eight days per month. Where parents do not resolve these issues in mediation, children see the non-custodian for an average of five days per month.

6. Savings in Time and Money

Successful mediation clients moved through the court system faster than their purely adversarial counterparts; but, unsuccessful mediation respondents traveled slowest. The average number of months between the initiation of proceedings and the promulgation of final orders was lowest for successful mediation respondents, 8.5 months. In the purely adversarial reject- and control-group samples, the average number of months between filing and final orders was 10.9 and 10.2, respectively. For unsuccessful mediation respondents, however, the average was 14.2 months. Since mediation often requires the postponement of an investigation and the continuation of a hearing on custody and visitation issues, it is not surprising that cases moved faster for those who either mediated or litigated than for those who did both.

As to attorneys fees, some evidence of savings was found, although not consistently. Nor were the savings as great as anticipated. The average legal fee paid by successful mediation-group respondents was $1,324. For unsuccessful mediation-group respondents, it was $1,544. And for the reject- and control-group respondents, it was $1,296 and $1,536, respectively.

For the disputants to earn greater savings in mediation, they may need to be diverted to it earlier in the dispute. For example, individuals who successfully mediated before receiving temporary orders paid an average of $874 in legal fees -- less than the average $1,075 paid by the control-group.

At this point, it cannot be fully explained why successful mediation-group respondents failed to experience greater savings in attorneys' fees regardless of their stage in the legal process. Perhaps if a case is not diverted to mediation early on, attorneys do a fair amount of preparation and incur large bills -- even though their clients ultimately work out their differences on their own. Another possibility is that the data are incomplete: when information on some of the more time-consuming and presumably more expensive cases becomes available, the cost patterns may change.

Summary of Short Term Effects

The first follow up interview, shows that regardless of the outcome, mediation generates user satisfaction, promotes agreement making and improves communication and understanding between former spouses. Successful mediation clients are also more satisfied and are in greater compliance with their agreements than their unsuccessful mediation counterparts as well as those who exclusively rely on the adversarial system. Successful clients enjoy the most contact with their children including joint custody arrangements and generous visitation terms. Finally, they move through court the fastest and realize some modest savings in attorneys fees, particularly if they are diverted to mediation prior to the promulgation of temporary orders.

Long Term Effects

To what extent are these patterns durable? To answer this question, we recontacted respondents in each of our samples six to twelve months later.

1. Agreement Making Skills

Parties with mediated agreements remain the most confident about their ability to work out problems, generate modifications with their ex-spouses and avoid returning to court. Respondents with non-mediated agreements are more likely to believe that a modification will necessitate litigation. Thus, one stable characteristic of the successful mediation client is his or her orientation to the autonomous resolution of future custody and visitation problems.

2. Satisfaction With the Agreement

Individuals with mediated agreements continue to express the greatest satisfaction with the mediation process and their divorce decrees and final orders. At the same time, it is important to note that satisfaction with the decree has declined among successful mediation clients and that the samples are more similar in this respect. Unsuccessful mediation clients, on the other hand, are far less satisfied than they were at the first interview, leaving them no more satisfied with their final court orders than those parties relying solely on the adversarial system. Thus, while the short-term satisfactions expressed by unsuccessful clients may quickly fade, successful mediation clients, remain more satisfied.

3. Compliance and Relitigation

Successful mediation clients continue to report the fewest number of serious disagreements over their settlements and the highest rates of spousal compliance. Interestingly, disagreements did not increase among any of the other groups and most of our samples also reported better spousal compliance with the decree than at the time of the first interview.

Relitigation patterns, however, are less clear cut. Although successful mediation clients are only half as likely to have filed for modification, compared to all other groups, filings for these clients increased by 9% between the first and second interviews. This was comparable to the rates of increase observed in the other samples during the same time period. It may well be the case that successful mediation clients were slower to begin filing but may ultimately modify at comparable rates. At the time of the second interview, 9% of the mediation-group and 20% of the control-group had initiated legal modification proceedings.

4. Improved Spousal Relations

Successful mediation clients maintain good relationships with ex-spouses. Compared to their adversarial and unsuccessful mediation counterparts, they continue to report better communications with and understanding of their ex-spouses. These individuals are almost 40% more likely to describe their relationships as "easy" or "strained" rather than "just about impossible" or "impossible."

The picture is very different for unsuccessful mediation clients. Six to twelve months down the line, they are virtually indistinquishable in their relations with former spouses from those who never attempted mediation. The improvements they reported in the first interview were clearly transitory. Improved spousal relations are characteristic only of successful mediation clients rather than all who try the process.

5. Consequences for Children and Parents

Between the first and second interview, the frequency of visitation increases in each of our groups but access remains greatest among those who successfully mediate. Specifically, we find that successful mediation clients now see their children an average of nine days per month, while the other groups average between five and seven days.

Summary of Long Term Consequences

Successful mediation clients continue to report a number of very desirable behaviors and attitudes over time. Compared to their adversarial and unsuccessful counterparts, they are: more optimistic about resolving future problems with their spouses and avoiding court; most satisfied with their decrees and court orders; less likely to report serious problems with their orders; more likely to report that their ex-spouse is complying with child and financial terms of their orders; more likely to report good relationships with former spouses, including improved communication and understanding, and more likely to enjoy joint custody arrangements along with more visitation with their children. They are also only half as likely to have initiated modification proceedings, although a rising proportion (9%) had initiated such actions. It is not yet clear whether successful clients will continue to relitigate less or just be slower in initiating modifications.

For unsuccessful mediation clients, the longer term picture is less positive. Over the long run, they do not greatly benefit from their exposure to the process. Their initial satisfaction with their agreements and reports of improved relationships with an ex-spouse soon evaporate, and they ultimately resemble those in the adversarial samples who were never exposed to mediation. The only real long-term differences between unsuccessful mediation clients and individuals who never used the process lie in the greater proportion of the former who have joint custody arrangements (14% versus 4%) and the greater average number of days per month non-custodians spend with their children (7 days versus 5 days). Thus, whether or not it results in an agreement, mediation inspires more co-parenting and visitation than adversarial interventions.

Discussion

Here we examine the benefits and limitations of mediation, especially as they compare to adjudication. In particular, we address the decision to mediate, the proportion of mediation cases that result in an agreement, satisfaction with the process and the agreements generated in mediation and adjudication, perceptions of fairness, compliance patterns and re-litigation behaviors.

As to the decision to mediate, we find that approximately half the disputants offered free mediation services reject them. This is consistent with the findings of other researchers. Due to refusals to mediate and to "no-shows", approximately 60% of the referred cases at the Neighborhood Justice Centers are never heard (Cook, 1980). It is worth noting that at least part of the rationale for California's recently enacted mandatory mediation law is a desire to overcome the substantial attrition rate that most voluntary programs experience.

Similarly, our agreement rate of 58% falls squarely in the range reported in the literature on mediation. In Los Angeles, for example, the Conciliation Court reports an agreement rate of 54.5%. In McEwen's sample of small claims cases, 66.1% of the mediation cases ended with an agreement (McEwen, 1981). Irving (1981) finds an agreement rate of 70% in the Conciliation Service of Toronto's Provincial Court, although many of these are agreements to seek further counseling or temporary agreements pending later court action.

Not surprisingly, mediation leads to compromise. In the Denver Project, most couples who reach mediation agreements opt for joint legal custody, an arrangement rarely selected by those who are exposed only to the adversarial process. Among mediation couples who select sole custody, non-custodians receive more visitation than is commonly found in non-mediated agreements. There is clearly more give and take in custody mediation than custody adjudication.

According to McEwen, mediated agreements in Maine's small claims program also reflect greater compromise than adjudicated ones. While in nearly half of the adjudicated cases the plaintiff was awarded all or nearly all of the claim, this occurred in only 16.9% of the mediated cases. Additionally, the plaintiff was more likely to win something in mediation than in adjudication.

Time and again, we find that individuals who mediate are extremely pleased with the process whether or not they are able to generate a mediation agreement. In the Denver Project, for example, 77% of all those who tried mediation said they were satisfied with the process in the second interview. By way of contrast, no more than 42% of respondents in any of our samples (mediation or adversarial) reported being satisfied with the court process. In a similar vein, William Felstiner (1980) reports that 8 to 14 months after mediating issues of assault, battery and harrassment in the Community Mediation Program in Dorchester, Massachusetts, most people are glad that they tried mediation (78%), think it helped their situation (50%), and feel that they had an opportunity to air their complaints (70%).

A fourth feature of mediation is the extent to which it is perceived as a fair process. In the Denver Project, clients who reached a mediation agreement were typically pleased with the agreement and impressed with its fairness. Compared to adjudicating litigants, parties who used Maine's small claims mediation service were also more often to evaluate their settlements as fair (67.1% versus 59.0%), and were almost twice as likely to share their opponent's view of the outcome (McEwen, 1981). Clearly, the give-and-take of negotiation has the effect of reducing polarization between parties to a dispute.

A related finding in the mediation literature is improvements in the relationship between disputants. In the Denver Project, all disputants who mediated experienced immediate improvements in their relationships, although lasting improvements were only noted for those who reached mediation agreements. These conclusions are echoed in Parker's (1980) research on divorce mediation in Atlanta. Davis (1980) finds that adversaries in felony offenses who mediate are better able to understand one another, and that mediating plaintiffs are ultimately less angry at and fearful of "defendants" than those who adjudicate. And in Maine's small claims mediation program, McEwen (1981) reaches similar conclusions.

Along with other researchers, we find that mediated agreements result in better compliance. In the Denver Project, successful mediation clients report the highest levels of personal and spousal compliance and the lowest incidences of serious problems. McEwen (1981) finds that mediation clients perceive themselves to be legally obligated to comply, a sentiment lacking among adversarial disputants. Indeed, while 70.6% of the mediation agreements with a monetary settlement were reported to be paid in full, this was reported by only 33.8% of the adjudicated cases. Finally, Felstiner (1980) notes that mediation clients report that the other party complies in 68% of the felony cases he studied. There seems to be little doubt that mediation has a greater capacity than adjudication to secure compliance with the terms of settlement.

Compliance, however, does not necessarily eliminate the need for modification and/or relitigation. While several studies find that relitigation among mediation clients is rare (e.g., Irving concludes that only 10% of the mediated cases return to court by the end of one year and Cook (1980) reports no further problems in 70 to 80% of the cases mediated in the Neighborhood Justice Centers), those who compare mediating individuals with their adjudicating counterparts often reach different conclusions. For example, Felstiner (1980) notes no difference between adversarial and mediating parties in their relitigation patterns. Parker's (1980) work with divorcing couples finds no differences between the two groups in the number of contacts with third parties following the promulgation of a final decree. And Davis(1980) concludes that "there is little evidence that mediation was more effective than court adjudication in preventing recidivism during the follow up."

The findings of the Denver Custody Mediation Project are consistent with these patterns. Although relitigation is rare among those who successfully mediate and only 9% had initiated motions to modify at the time of the second interview (half the proportion relitigating in the adversarial samples), the rate of increase of modification activity between the first and second interview for this group was identical to the rate observed in adversarial samples. It remains to be seen what the future modification activity of successful mediation clients will be. According to research comparing mediation and adversarial clients in Hennepin County, Minnesota, relitigation for mediation clients is ultimately lower (Doyle and Caron, 1978).

Conclusions

Mediation produces substantial differences in behavior and attitude among those who contest child custody and visitation matters. The patterns are encouraging but far from definitive. And certain nagging questions remain.

One is the pervasive underutilization of mediation services by the general public. Does the high refusal rate encountered to date in all voluntary mediation programs compromise the efficacy of the procedure? Or is the lack of utilization merely a reflection of a massive public education problem and/or the need for legislation that makes an attempt to mediate mandatory?

A second issue is the effectiveness of the procedure with uncooperative and otherwise uncompromising mediation candidates. We find that mediation works with many couples who have extremely strained relationships, complex disputes and severe financial pressures (Pearson, et al., 1982). Nevertheless, mediation clearly does not work for everyone. Additional research is needed to clarify the precise characteristics of couples and disputes amenable to mediation and the mediator techniques and strategies associated with effective outcomes.

Third, we need to consider ramifications of joint custody arrangements on children and their parents. Mediation inspires compromise. In custody disputes, this spells joint custody and other child-sharing arrangements. While some research suggests that shared parenting arrangements enhance child adjustment following divorce and are preferable to sole custody arrangements (Luepnitz, 1982), joint arrangements run counter to long standing notions about the importance of the "psychological parent" and custodial stability (Goldstein, et al., 1973).

Finally, we must face the question of whether mediation agreements are ultimately durable. Only time and continued research will reveal whether successful mediation clients relitigate at rates lower to, higher than or comparable to those observed in adversarial samples.

The Divorce Mediation Research Project is a major research effort that is already underway to answer some of these questions. No doubt in coming years, we will be able to speak with greater certainty about the strengths and weaknesses of mediation.

FOLLOW UP I

	MEDIATION GROUP			
	Successful	Unsuccessful	Control	"Rejecting"
AGREEMENT MAKING				
a) Stipulated prior to final hearing	100%	65%	48%	53%
b) Those interested in modifying who anticipate reaching decision on their own	40%	18%	16%	29%
SATISFACTION & COMPLIANCE				
a) Highly satisfied with mediation process	70%	22%	NA	NA
b) Satisfied with decree	71%	67%	58%	54%
c) Have filed motion to modify	0%	12%	20%	14%
d) Report serious disagreements have arisen over settlement	13%	36%	40%	32%
e) Report spouse to be in compliance	66%	30%	34%	46%
RELATIONSHIP WITH FORMER SPOUSE				
a) Relationship is "friendly" or "strained"	81%	50%	41%	45%
b) Decision making process improved:				
Communications	69%	31%	17%	10%
Anger	47%	23%	11%	10%
Cooperation	62%	19%	15%	12%
Understanding	75%	27%	24%	18%
RELATIONSHIP WITH CHILDREN				
a) Custody arrangement:				
Joint	69%	14%	7%	6%
Mother sole custodian	20%	62%	72%	62%
b) Average number of days per month the non-custodian sees the children	7.7	5.5	4.9	4.9
SAMPLE SIZE	62	63	63	95

Follow Up II

	MEDIATION GROUP			
	Successful	Unsuccessful	Control	"Rejecting"
AGREEMENT MAKING				
a) Those interested in modifying who anticipate reaching decision on their own	41%	16%	26%	14%
SATISFACTION & COMPLIANCE				
a) Satisfied with mediation process	98%	57%	NA	NA
b) Satisfied with court process	38%	36%	36%	42%
c) Satisfied with decree	63%	45%	54%	51%
d) Have filed motion to modify	9%	22%	20%	20%
e) Report serious disagreements have arisen over settlement	9%	36%	36%	20%
f) Report spouse to be in compliance	59%	30%	30%	37%
RELATIONSHIP WITH FORMER SPOUSE				
a) Relationship is "friendly" or "strained"	81%	39%	54%	42%
b) Decision making process improved: Communications	50%	19%	34%	24%
Anger	46%	17%	32%	31%
Cooperation	43%	19%	30%	16%
Understanding	32%	11%	26%	13%
RELATIONSHIP WITH CHILDREN				
a) Average number of days per month non-custodian sees the children	9.0	7.1	5.1	5.4
SAMPLE SIZE	61	64	50	70

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PROCEDURAL CONTROLS IN PUBLIC SECTOR DOMESTIC RELATIONS MEDIATION

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PROCEDURAL CONTROLS IN PUBLIC SECTOR DOMESTIC RELATIONS MEDIATION

The purpose of this article is to survey the procedural controls presently applicable to public sector domestic relations mediation.[1] Throughout the United States the authority for the mediation programs studied varies from jurisdiction to jurisdiction. It may be (1) explicit legislation permitting or requiring the implementation of public sector mediation,[2] (2) a statewide administrative order or policy of the judicial department,[3] (3) a local court rule or administrative order[4], or (4) internal policies and procedures of an agency providing support services to the court.[5]

For comparison, conciliation or other legislation that implicitly authorizes mediation, whether or not the author knows that a public sector mediation program actually exists in that jurisdiction, is also included.[6] The article attempts to give an overview of the state-of-the-art of procedural control in public sector mediation, without examining the intrinsic differences in the types of legal authority relied upon for program implementation.

A. Definitions of Mediation

Whether or not a definition is precisely given for mediation, the working assumptions underlying the definition of the process contribute a great deal to the development of procedures governing it. Thus, it is useful to consider carefully the explicit or implicit definition of mediation. Is it a conflict resolution technique or a springboard for personal growth? Should mediation cut down on the court overload or foster good post-divorce coparenting? Is it more important that the process be confidential, or that litigation be resumed and completed as quickly and inexpensively as possible if mediation fails? Should the model implement family self-determination according to the family's chosen style, or should the government continue to intervene on the basis of information that would never justify intervention if the family remained intact? Is the method therapeutic or essentially task oriented? Or should diverse methods be available depending upon the circumstances, the parties' desires and resources?[7]

Michigan's pending legislation offers the following definition: "Domestic relations mediation means a process by which the parties are assisted by a domestic relations mediator having qualifications specified in section 13, in voluntarily formulating an agreement to resolve a dispute regarding a domestic relations matter."[8] The Subcommittee Report explains, "The mediator assumes the role of a facilitator, a neutral third-party intervenor. In this role, the mediator is a negotiator who clarifies the issues, identifies alternatives, and helps disputants to come to a mutual agreement. The mediator does not make a decision for the parties..." (Emphasis in original).[9]

Where other legislation explicitly authorizes mediation, we may find no definition, but must look to the legislative purpose of mediation.[9A] Thus, in Florida, a county may establish a family mediation service "to assist parties in resolving any controversy involving the family."[10] The purpose of custody and visitation mediation in California is "to reduce acrimony which may exist between the parties and to develop an agreement assuring the child or children close and continuing contact with both parents after the marriage is dissolved".[11] This purpose combines theraputic and task oriented methods with a strong statement of public policy in favor of continued parental involvement with children after divorce. The Florida purpose, by contrast, is as broad as possible and therefore imposes no particular method or policy other than a nonadversary forum.

Often the legislation providing the legal authority for mediation services does not even mention the word mediation.[12] Where this is the case, the statutory authority of the public employee mediators is circumscribed by the purposes stated in the enabling legislation. For example, in addition to a purpose of reconciling the spouses to each other, counselors in Connecticut have statutory authority to meet with the parties to "explore the possiblity of...resolving the emotional problems which might lead to continuing conflicts following a dissolution of the marriage."[13] By contrast, that additional purpose in Arizona is stated as "amicable settlement of the controversy between the spouses or parents, so as to avoid further litigation over the issue involved."[14] From the legislation alone, it would seem that a therapeutic model is mandated for mediation relying upon the Connecticut implicit authorization, whereas in Arizona the major emphasis would have to be to reduce the court overload.

Sometimes implicit authorization is even less direct and more confusing. For example, one possible basis of legislative authority in Hennepin County, Minnesota, where neither counseling nor mediation services are explicitly authorized by statute, is the court's power to order a custody investigation.[15] Looking at the process from this perspective, it might be defined as an exploration from the viewpoint of two acknowledged experts -- the parents -- of the most nurturing custody arrangements for their children.[16] However, the public employee in this model cannot legitimately escape the ultimate statutory charge to form an opinion, to report to the court and be cross-examined.[17] Thus the mediation process itself will be different from one in a jurisdiction which guarantees confidentiality.[18] The investigative model does display a recurring theme, that of the mediator as somehow charged with the responsibility of advocating for the best interest of the child.[19]

Some conclusions may be drawn from this potpourri of definitional items. All encompass the notion of a nonadversarial forum for resolving conflict. The authority for decision making rests with the parties, although the "neutral" mediator is often charged with some type of responsibility for protecting the best interests of the children. The goal is for the parties to reach a voluntary agreement which may be reported back to attorneys and the court.

B. Eligibility for Mediation

Rules of eligibility for mediation may be incorporated into the statute[20] or other authority[21] creating the service, or the power to make such rules may be delegated to the county board[22] or court.[23] However originated, these rules usually cover the following areas: mediable issues, client qualifications, timing with regard to the institution or completion of litigation, and duration of mediation services.

The following have been considered appropriate mediable issues in the public sector: custody disputes,[24] visitation,[25] child support,[26] joint custody plans,[27] domestic abuse,[28] other matters involving a minor child's welfare,[29] spousal support,[30] property settlement,[31] and miscellaneous matters involving family relationships in dissolution or otherwise.[32]

Often the public resource is allocated first to custody and visitation disputes,[33] and second to other disputes involving a minor child's welfare.[34] In these jurisdictions, all other issues are mediable only as staff schedules permit.[35]

In general, clients must be physically present in the jurisdiction[36] and (except for those issues, and in those jurisdictions, in which a mediation attempt is mandatory)[37] avoid displaying behavior that contraindicates a reasonable possibility of amicable settlement.[38] Parties displaying longstanding bitterness,[39] physical abuse,[40] or lengthy psychiatric histories,[41] for example, are ineligible for some mediation services.[42] Provisions exist which take care not to exclude clients on the basis of marital status,[43] biological or legal parenthood,[44] or condition of indigency.[45] Care has also been taken that geographic area of residence within the jurisdiction not be a factor in excluding otherwise eligible clients.[46]

Sometimes mediation services are available only while litigation is actually pending.[47] But other jurisdictions allow clients to mediate before filing the dissolution petition or motion to modify,[48] or after the decree or order,[49] if certain requirements are met. For example, a joint petition to mediate may be required,[50] or there must be a determination that mediation of priority cases -- those already in litigation -- will not be postponed to mediate a prelitigation case.[51] Still other jurisdictions routinely permit or even encourage clients to mediate before filing their litigation pleadings,[52] perhaps reasoning that the process will be more effective if undertaken before positions are shaped by trial logic.[53]

Statutes and Orders sometimes set a maximum duration for the mediation sessions.[54] More often, the administrator of the program institutes flexible guidelines.[55] In actual experience, the parties may have access to mediation services for any duration from one mediation session[56] to a maximum of ten weeks.[57] If a mediated agreement breaks down before incorporation into a court order, because of reservations either from the parties or their attorneys, mediation is almost always available again to reach a new agreement.[58]

C. Initiating the Process

Mediation is initiated both by mandatory and voluntary procedures. In certain jurisdictions, mediation is mandatory for certain disputed issues, usually custody and visitation,[59] but sometimes any dispute affecting a minor child's welfare.[60] Mediation may also become mandatory for one party when, upon the request of the other party, the judge has ordered mediation,[61] or the statute requires the clerk to issue an order for mediation automatically.[62] Finally, mediation may become mandatory because a judge or referee, on his or her own motion, has ordered the procedure for particular parties.[63]

In all other jurisdictions and situations, mediation is voluntary. Parties initiate mediation either by a joint petition for conciliation[64] or simply by self-referral.[65] Where a petition is required, staff are available to assist the parties in filling out the form and presenting the petition so that the comparative informality of the process is maintained.[66] Parties may also be referred to the mediation services from other agencies.[67]

Of the jurisdictions in which mediation is voluntary, some take considerable care to assure parties of the nonmandatory nature of the services.[68] Others, while maintaining the voluntary character of the service, utilize strong incentives to encourage mediation.[69] These incentives range from postponing the decree until the judge is satisfied that all reasonable attempts have been made to mediate a settlement,[70] to requiring a court order before allowing parties to proceed without mediating.[71] Fees have been proposed which penalize litigation when mediation is an available option.[72] And procedures have been suggested for offering mediation as an alternative to proceeding with a complaint under a support enforcement act[73] or with a custody investigation.[74]

D. Interface of Mediation With the Adversary Timetable

It is almost universally agreed among family mediation educators that suspending all litigation activities, including discovery, is most helpful in fostering the cooperative atmosphere conducive to agreement making.[75] There exists a tradition in conciliation legislation, much of it applicable to mediation as well, for postponing litigation a specified time period from the filing of the petition for conciliation, whether or not litigation has already commenced.[76] This period varies, depending upon the jurisdiction, from thirty to ninety days.[77] Occasionally, there is no specified time, leaving the expiration date of the stay a matter for the judge to decide on a case-by-case basis.[78] The duration of the stay may be extended by the court for good cause shown,[79] or if both parties agree to the extension.[80] Similarly, the court may lift the stay for good cause shown,[81] or on certification by the mediator that an agreement cannot be reached.[82] The stay has no effect on the court's jurisdiction to enter temporary orders.[83]

In Connecticut, the court may order a stay in the litigation as a penalty when a party resists a court order to mediate.[84] Other states cite the resisting party for contempt, but assure that the flow of litigation will not be interrupted as a penalty.[85]

In Hawaii's First Circuit, litigation is interrupted by the court at the time the parties seek an order for a custody investigation,[86] unless good cause is shown to believe mediation can serve no useful purpose.[87] The court directs the parties to seek mediation, and will not resume litigation by ordering the investigation until advised that mediation has failed.[88]

The intent of these provisions, of course, is to encourage agreement-making. If this task is accomplished, the parties usually experience a shorter wait from filing the dissolution petition to obtaining a final decree.[89] But if the parties fail to reach agreement, the entire time period -- from decision to fulfill the legal requirements for obtaining a divorce, to the date of the decree -- may be considerably longer than it would have been if mediation had not been attempted.[90] One method for remedying this situation is to utilize the mediator as a custody investigator when mediation has failed,[91] in an attempt to prevent duplication of effort and waste of time. This approach necessarily affects the degree of confidentiality of the mediation proceedings, and will be explored in more depth in the discussion of confidentiality which follows.

E. Confidentiality

In most jurisdictions, mediation conferences are closed to all but the parties, their counsel,[92] experts, witnesses and persons involved in the controversy,[93] the mediator and officers of the court.[94] Files generally are closed to all but parties and their counsel[95] and, sometimes, the court.[96] While these provisions insure privacy of the mediation process from the general public, they do not address the question of the admissibility, in subsequent litigation, of evidence revealed during mediation. It is this latter question that is here discussed under the topic of confidentiality.

The jurisdictions administering public sector mediation programs are divided on the question whether to assure confidentiality of mediation sessions. Some who do not assure confidentiality may wish to do so, but lack adequate statutory protections.[97] Others may have philosophical reservations about assuring confidentiality to the parents when so much of the information revealed to the mediator has a direct bearing on the custody issue, which the courts must determine in accordance with the best interests of the child.[98]

In those jurisdictions endeavoring to assure confidentiality of the process, one of two theories is relied upon: privileged communications,[99] or the inadmissibility of evidence of compromise negotiations.[100] The provision based on privilege may either state that conversations with the mediator are confidential,[101] or that they are privileged.[102] Sometimes the provision elaborates: not only verbal or written communications to the mediator,[103] but mediator notes and observations[104] and documents prepared by a third party for use in mediation[105] are privileged. The privilege may,[106] or may not,[107] be waivable, depending upon the jurisdiction. An occasional provision explicitly extends the privilege with respect to communication between parties, and to and from other attendees at the mediation session, such as children, new partners, relatives, neighbors, consultants or stepparents.[108] The privilege relied upon may not be specifically addressed to mediators, but to all public officers or government employees.[109] Usually where privileged communications is the basis of confidentiality, there exist certain statutory exceptions: child abuse,[110] for example, or the contemplation of other crime.[111]

Where no statutory basis for privilege exists, administrators have sometimes relied upon the rule that evidence of offers to compromise are not admissible for the purpose of proving the validity or amount of any claim.[112] Unfortunately, this rule is best known to litigators for its exceptions, not its prohibitions. Such evidence is admissible for other purposes: for example, to show bias or prejudice, or to impeach a witness.[113] Moreover, the prohibition does not extend to evidence otherwise discoverable, through interrogatories or depositions, or by subpoena or requests for production of documents.[114]

Another method administrators have utilized to assure some modicum of confidentiality is to seek a "gentleman's agreement" from the attorneys for the parties to preserve the confidentiality of the mediation sessions.[115]

In jurisdictions where mediators are expected to maintain the confidentiality of client communications, various personnel measures have been implemented to avoid jeopardizing, or even appearing to jeopardize, this trust.[116] For example, where the same employee may be assigned to perform both mediator and investigator functions, it is common to provide that the two functions may not be performed by the same employee in the same case,[117] although in some jurisdictions this provision is waived if both parties consent.[118]

Typical rationales for separating the functions in order to preserve confidentiality include (1) the need to encourage full and free disclosure of information, (2) the value of the non-adversary role in encouraging the family to utilize mediation for continuing family needs, and (3) the preference of attorneys who are asked to allow unrepresented client participation.[119]

In other jurisdictions, care is taken to alert the parties to the fact that there is no guarantee of confidentiality.[120] In many of these jurisdictions, it is routine practice for the mediator to perform the investigative function and make a recommendation to the court if the mediation procedure fails.[121]

Typical rationales for combining the roles (and therefore disavowing confidentiality) include (1) the frequency with which cases settle during investigation, (2) avoidance of duplicated effort, and (3) the ability of a mediator-investigator to reduce acrimony associated with a formal court hearing.[122]

F. Legal Representation of the Parties

It is generally understood that parties are to seek separate legal counsel before, during and after the mediation process to advise them and expecially to review, comment upon and approve the final mediated agreement.[123] Since mediation is considerably different as a process from legal proceedings, there has been some understandable confusion within the legal profession as to the proper interface of the roles of attorney and mediator.[124] Nevertheless, where exposure to mediation has been high, and it is possible for attorneys to observe the results of the mediation process, there has been a high level of cooperation and support by attorneys and a high percentage of direct referrals by attorneys to the mediation process, often prior to filing initial pleadings.[125]

Because the mediation process of its very nature requires a distance from the adversarial mode, in some jurisdictions, mediators have been given the authority to exclude counsel for the parties from the mediation conferences.[126] In spite of this fact, it is often the practice of mediators to meet with counsel for the parties together, but without their clients, to discuss the mediation process, its confidentiality and the input of counsel as to their definition of the human issues to be addressed in mediation.[127] As necessary, counsel are consulted by their clients for advice on legal questions as they arise. Once the mediation results in an agreement, this agreement is reviewed by counsel for each party and resubmitted to mediation if either counsel raises objections or issues not considered and resolved in mediation.[128] The final agreement is drafted in proper legal form by one of the attorneys for approval by both and incorporation by the court into its order or decree.[129]

Parties appearing on their own behalf without counsel are encouraged[130] in some jurisdictions (at least, as to the early stages of mediation) and discouraged in others.[131]

G. Mediators

It is generally recognized that the quality of the mediator is essential to the success of any mediation effort.[132] This concern has been met by a variety of statutory and administrative provisions. Required qualifications for the position of mediator have usually been a masters degree in family counseling, social work or related fields.[133] Experience requirements are substantial as well.[134] There may be provisions for interchanging some education and experience requirements.[135] Since mediation is an evolving profession, it is appropriate that provisions are included for in-service training of personnel.[136] Some programs may at times hire partly on the basis of sex, since in some jurisdictions mediation is done by a male-female team.[137] This mix may be accomplished by co-mediation by staff members,[138] or a staff member with a volunteer.[139]

Mediators in public employment come from a wide variety of backgrounds. They may be hired and utilized exclusively on the mediation staff[140] or be available for assignment to other duties of the agency, such as probation supervision,[141] custody investigation[142] and domestic relations counseling.[143] The court may utilize professionals in the private sector such as clergymen, marriage counselors and other professionals with expertise in the matter in controversy.[144] Provisions also exist for utilization of trained volunteers.[145]

Mediators in some jurisdictions have special statutory powers. For example, the mediator may have the power to recommend mutual restraining orders, pending determination of the controversy, to protect the well-being of the children.[146] Or the mediator may have the power to order visitation scheduling if the parties cannot agree.[147] He or she may be able to exclude counsel from the mediation sessions,[148] or to certify to the court that further mediation would not be productive.[149] The mediator may call other professionals into the mediation sessions to advise the parties.[150] Finally, it is not unusual for the mediator to have the power to make recommendations to the court.[151]

In addition to special powers, mediators are sometimes made responsible for fulfilling certain duties or obligations. Thus, a mediator may be under a duty to assess the needs and interests of the child involved in the controversy.[152] Similarly, he or she may have the obligation to use best efforts to effect a settlement of the controversy.[153]

Statutory powers and obligations of the mediator may give rise to liability in the mediator for abuse of the power, or for failure to meet the obliations. Very few statutes specifically address this problem, leaving it to the general provisions covering liability of public servants.[154] Some mediation legislation, not connected with divorce and custody mediation however, has been proposed which would limit the potential liability of mediators to acts of gross negligence or bad faith.[155]

As problematic as liability issues are those of professional ethics. At this juncture, mediation is a non-regulated profession, in contrast to other professions such as physicians, attorneys, psychologists and social workers. Education for mediation has not yet been systematized. However, the profession has begun to develop some self-regulating mechanisms, as have other professions before it.[156] And often the matter is handled in great detail at the administrative staff level.[157]

A practical safeguard for a mediator who has observed an agreement which offends the mediator's ethical code is to make a recommendation to the court[158] or to certify the mediator's non-approval of the parties' agreement.[159]

M. Public Information Function

As is usual for a public agency delivering a public service, the mediation program will have some mechanism for distributing information about what services it offers and how the public may make use of these services.

In addition, some mediation programs are authorized or required by statute to engage in research or educational efforts,[160] or other endeavors related to the purpose and policy of the legislation.[161] These endeavors may first need to be approved the trial court, county government or agency director.[162]

On the administrative level, it is common for a mediation service to present periodic short programs designed to inform families in dissolution of the court procedures and services as well as the legal and financial issues of divorce.[163] Other programs treat the emotional issues of adult separation, the impact of divorce on children and specific information on the pros and cons of joint custody arrangements.[164]

Sometimes advisory committees have been formed to prepare and distribute public information brochures concerning the issues in divorce and continued parenting, as well as the appropriateness of mediation in resolving these issues.[165] In other instances, judges and administrators have engaged in public speaking to further educate the citizenry in regard to these issues.[166]

Conclusion

Anyone drafting procedures for public sector domestic relations mediation will need to consider the definition of mediation, eligibility guidelines, how mediation is initiated, the reciprocal effect of mediation and litigation timetables, the extent of confidentiality to be provided, the role of attorneys for the parties, the quality of mediators and definition of their duties, and the extent to which the public agency will be involved in research and education efforts. It is hoped that the survey here presented will assist in these drafting tasks while providing a base for more analytical evaluation of the various options presented.

[1] As used herein, mediation is distinguished from litigation and arbitration by several factors, chief among which is that decisionmaking authority, for purposes of defining the terms of an order or decree and agreeing to those terms, remains with the parties. See discussion at notes 7-19. *infra*.

[2] *E.g.*, Fla. S.B. 439 sec.2 (effective July 1, 1982); Cal. Civ. Code sec. 4607 (West); Cal. Civ. Proc. Code sec.1740 *et seq* (West); Proposed Mich. H.B. 4870 (1982 Session); Proposed Wash. H.B. 905 and S.B. 4509, 47th Legis. (1982).

[3] *E.g.*, Conn. Superior Ct. Family Div. Ann.Rep. (1979-80) hereinafter "Conn. Ann. Rep."; *See*, Conn. Gen. Stat. sec.51-1 through 6.

[4] *E.g.*, Admin. Order No. 79-25; 17th Jud. Cir., Broward County, Fla. (Oct. 5, 1979) (hereinafter "Broward County, Fla. Admin. Order"); Referral of Visitation Disputes to Mediation, Family Ct. 1st Cir., Honolulu, Hawaii (March 31, 1981) (hereinafter "Hawaii Procedure"); Proposed Procedure for Child Custody Mediation in Participating Departments, 2d. Jud. Dist., Washoe County, Nev. (March, 1982 draft) (hereinafter "Nevada Proposed Procedure").

[5] *E.g.*, Domestic Relations Division Services, Hennepin County. Minn. Dept. of Court Services, D.R. Div. (Apr. 28, 1980) (hereinafter "[illegible]. County, Minn. D.R. Services Memo"); Family Court Counseling Service, Dane County, Wisc. (brochure) (hereinafter "Dane County, Wisc. FCCS brochure"); telephone conversation with Joseph Connelly, Dir., Family Service Unit, Probate and Family Court, Middlesex County, Mass. (March, 1982).

[6] *E.g.*, statutes cited at note 12, *infra*.

[7] For a good general compilation of essays addressing the range of issues presented, see *Divorce Mediation-Theory and Practice*, conference materials for The Association of Family Conciliation Courts (Winter, 1981 conference).

[8] Proposed Mich. H.B. 4870, sec.31(3) (1982 Session).

[9] House Judiciary Committee on Domestic Relations, Subcommittee Report on House Bills 4870 and 4871 at 2 (Mich. 1982 Session).

[9A] *E.g.*, Proposed Wash. H.B. 905, 47th Legis (1982). For an illustration of the fact that the definition of mediation is not self-evident, see Mich. R. Civ. Proc. 316, titled "Mediation" but implementing a procedure more classically known as arbitration.

[10] Fla. S.B. 439, sec.2 (Effective July 1, 1982); Fla. Stat. sec.61.21(1).

[11] Cal. Civ. Code sec.4607 (West).

[12] *E.g.*, Ariz. Rev. Stat. Ann. sec.25-381.01; Hawaii Rev. Stat. secs.571-1 and-46.1; Kan. Stat. Ann. sec.60-1608(c); Mont. Rev. Code Ann. secs.40-3-102, -121, and 40-4-224(4); Neb. Rev. Stat. secs.42-801 and -812; N.D. Cent. Code secs.27-05.1-01 and -10; Ohio Rev. Code sec.3117.05(a); Rev. Code Wash. sec.26.12.100.

[13] Conn. Gen. Stat. sec.46b-53.

[14] Ariz. Rev. Stat. Ann. sec.25-381.01. The Broward County, Florida, Family Conciliation Unit brochure articulates one simple, clarifying definition: Mediation is "an intervention between two disputing parties where the goal is to help them reach an amicable settlement."

[15] Minn. Stat. sec.518.167.

[16] *Cf.*, definition of custody mediation process as "designed to give the family primary responsibility for determining custody," or process through which "alternative solutions are examined by the family, details are clarified, and a report outlining the areas of agreement is written to the court and attorneys." Henn. County, Minn. D.R. Services Memo, *supra* note 5. "This process is not an investigation but an effort to use the parents' knowledge of their children's needs, combined with the counselor's skill as a clinician and a mediator." Dane County, Wisc. FCCS brochure, *supra* note 5.

[17] *E.g.*, Minn. Stat. sec.518.167.

[18] See discussion at notes 92-122, *infra*.

[19] *E.g.*, Cal. Civ. Code Secs. 4607(d) and (e) (West).

[20] *E.g.*, Cal. Civ. Code sec.4607 (West); Proposed Mich. H.B. 4870 (1982 Session).

[21] *E.g.*, Conn. Ann. Rep., *supra* note 3.

[22] *Cf.*, Or. Rev. Stat. sec.107.615(3); Rev. Code Wash. sec.26.12.220 (conciliation legislation).

[23] *Cf.*, Or Rev. Stat. sec.107.580 (conciliation legislation).

[24] *E.g.*, Cal. Civ. Code sec.4607; Proposed Mich. H.B. 4870, secs.5(b) and 13 (1982 Session); Proposed Wash. H.B. 905, 47th Legis. sec.10 (1982); Conn. Ann. Rep., *supra*. no.3 at 2; Hennepin County, Minn. Program Budget Narrative, Budget Yr. 1982 at 1-2 (hereinafter "Henn. Budget"). *Cf.*, Ariz. Rev. Stat. Ann. sec.25-381.08.

[25] *Id.*; Hawaii Procedure, *supra* note 4.

[26] *E.g.*, Cal. Civ. Proc. Code sec.1760 (West); Cal. Civ. Code sec.4600.5(f) (West); Conn. Ann. Rep., *supra* note 3, at 7-8; Henn. Budget, p.1-2, 4; Proposed Mich. H.B. 4870 secs.5(6), 11(4), 13(1) and 31(4) (1982 Session). *Contra*, Proposed Mich. H.B. 4870 sec.13(5) (1982 Session). *Cf.*, Proposed Wash. H.B. 1163, 47th Legis. sec.302(b) (1982) (creating Special Commission on Child Support Guidelines to develop methods of arbitrating disputes between parties relating to child support to facilitate settlement out of court). *Cf.*, Ariz. Rev. Stat. Ann. sec.25-381.08 (conciliation provision).

[27] *E.g.*, Cal. Civ. Proc. Code sec.1760 (West); Cal. Civ. Code sec.4600.5(f) (West); Fla. S.B. 439 (Effective July 1, 1982); Proposed Wash. H.B. 473 sec.3(2) and H.B. 905 secs.2(5), 4 and 7, 47th Legis. (1982); Dane County, Wisc. FCSS brochure, *supra* note 5. *Cf.*, Ariz. Rev. Stat. Ann. sec.25-381.08 (conciliation); N.H. Rev. Stat. Ann. sec.458:17II.(b) (court may appoint G.A.L. who may utilize experts); Minn. Stat. sec. 518.17 subd. 2 (b) (in determining whether joint custody is in child's best interest, court shall consider what methods exist for resolving disputes and parents' willingness to use those methods); Prop. Ariz. S.B. 1330, 35th Legis. sec.2 (1982) (conciliation of joint custody plans or disputes thereunder).

[28] *E.g.*, Conn. Ann. Rep., *supra* note 3, at 7-8; Henn. Budget, *supra* note 24, at 4.

[29] *E.g.*, Cal. Civ. Proc. Code sec.1760 (West); Cal. Civ. Code sec.4600.5(f) (West); Proposed Wash. H.B. 905, 47th Legis. sec.15 (1982). *Cf.* Ariz. Rev. Stat. Ann. sec.25-381.08; Mont. Code Ann. sec.40-3-111(2); Neb. Rev. Stat. sec.42-811; Pa. Stat. Ann. tit. 23 sec.202(c) (Purdon) (conciliation provisions).

[30] *E.g.*, Cal. Civ. Proc. Code sec.1772 (West); Conn. Ann. Rep., *supra* note 3, at 7-8. *Contra*, Proposed Mich. H.B. 4870 sec.13(5) (1982 Session).

[31] *E.g.*, Cal. Civ. Proc. Code sec.1772. *Cf.* Early Settlement Programs conducted on volunteer basis by members of New Jersey Bar (3-member panel gives opinion on ultimate resolution by court if matter goes to trial). *Cf.*, Rev. Code Wash. sec.26.12.210 (conciliation provisions).

[32] *E.g.*, Proposed Mich. H.B. 4870, secs.13(1) and 31(4) (1982 Session) (paternity). *Cf.*, Ariz. Rev. Stat. Ann. sec.25-381.08 (disruption of household) (conciliation provision).

[33] *E.g.*, Cal. Civ. Code sec.4607 (West); Conn. Ann. Rep, *supra* note 3 at 2; Or. Rev. Stat. sec.107.580. *Cf.*, Mich. Stat. Ann. sec.25.123(6) (counseling priority given to parties who have already filed complaint or motion).

[34] *E.g.*, Cal. Civ. Proc. Code sec.1760 (West); Cal. Civ. Code sec.4600.5(f) (West); Broward County, Fla. Admin. Order, *supra* note 4,sec.II. *Cf.*, Ariz. Rev. Stat. Ann. sec.25-381.08; Mont. Code Ann. sec.40-3-111(2). Ohio Rev. Code sec.3117.08(B); Rev. Code Wash. sec.26.12.090 (conciliation provisions).

[35] *E.g.*, Cal. Civ. Proc. Code sec.1772 (West). *Cf.*, Ariz. Rev. Stat. Ann. sec.25-381.20; Mont. Code Ann. sec.40-3-111(3); Neb. Rev. Stat. sec. 42-823; Or. Rev. Stat. sec.107.580 (conciliation provisions).

[36] *E.g.*, Modification of Instruction Issued March 31, 1981 Regarding Referral of Visitation Disputes to Mediation, Family Ct. 1st Cir., Honolulu, Hawaii (Jan. 25, 1982) (hereinafter referred to as "Hawaii Mod. Instruction"). *See*, Hawaii Procedure, *supra* note 4.

[37] Notes 59 through 63, *infra*.

[38] *E.g.*, Cal. Civ. Proc. Code sec.1771 (West); Hawaii Mod. Instruction, *supra* note 36 (party may avoid referral to mediation by showing there is good cause to believe it can serve no useful purpose); Nev. Proposed Procedure, *supra* note 4,sec.I (may avoid referal by showing reasonable grounds why mediation not in the best interests of the child or children involved). *Compare*, Ariz. Rev. Stat. Ann. sec.25-381.19; Mont. Code Ann. sec.40-3-127(3); Neb. Rev. Stat 42-822 (conciliation provisions stating standard set forth in text) *with* Ariz. Rev. Stat. Ann. sec.25-381.20; Mont. Code Ann. sec.40-3-111(3); Neb. Rev. Stat. sec.42-823 (requiring that, where no minor child's welfare at issue, petitioners for conciliation must show that amicable adjustment of the controversy "can probably be achieved").

[39] *E.g.*, Conn. Ann. Rep., *supra* note 3, at 3.

[40] *E.g.*, Conn. Ann. Rep., *supra* note 3, at 3; Hawaii Mod. Instruction, *supra* note 36 (threats suffice).

[41] *E.g.*, Conn. Ann. Rep., *supra* note 3, at 3; Hawaii Mod. Instruction, *supra* note 36 (or when counseling or mediation has recently been attempted without success).

[42] In still other jurisdictions, parties may be deemed ineligible on a case-by-case basis, in the discretion of the judge, no standards given. *Cf.*, N.D. Cent. Code secs.27-05.1-06 and -48 (conciliation provisions).

[43] *E.g.*, Cal. Civ. Proc. Code sec.1760 (West). *Cf.*, Ariz. Rev. Stat. Ann. sec.25-381.01; Neb. Rev. Stat. sec.42-801 (conciliation provisions).

[44] *E.g.*, Cal.
Hawaii Procedure, *supra* note 4.

[45] *E.g.*, Cal. Civ. Proc. Code sec.4607(e) (West); Conn. Gen. Stat. sec. 46b-53(d) (statutory prohibition on fee for services); Broward County, Fla., Admin. Order No.79-25, sec.III; Proposed Mich. H.B. 4870 and 5257 (1982 Session) (apparent intent); Conciliation Court Task Force Report to the Custody and Visitation Subcommittee of the Family Law Section of the State Bar Association of California 7 (Dec. 15, 1981) (hereinafter, "Cal. Task Force Rep.") (in 74% of reporting counties, mediation is provided free to clients). *Cf.* Iowa Code sec.598.16 (court may waive fee); Mont. Code Ann. sec.40-3-122 (no fee); Mich. Stat. Ann. sec.25.123 (10) (court may waive fee); Neb. Rev. Stat. sec.42-819 (county may waive fee); N.D. Cent. Code sec.27-05.1-08 (no fee); Rev. Code Wash. sec.26.12.170 (county may waive fee) (all conciliation provisions). *Cf.* requirements that county provide, at no charge to clients, blank forms for petition for conciliation, as well as county employees to assist in preparing and presenting petition. Ariz. Rev. Stat. Ann. sec.25-381.12; Calif. Civ. Proc. Code sec.1764 (West); Mont. Code Ann. sec.40-3-122(3); Neb. Rev. Stat. sec.42-815; N.D. Cent. Code sec.27-05.1-07; Or . Rev. Code sec.3117.05(D); Rev. Code Wash. sec.26.12.130.

[46] *E.g.*, Cal. Civ. Code sec. 4607 (e) (West) (custody and visitation); Proposed Mich. H.B. 4870 sec.13(1) (1982 Session) (both statutory requirements that mediation services be made available in each county or circuit); Conn. Ann. Rep., *supra* note 3, at 2 (reflecting same requirement, based not on statute but on internal administration of judicial department); McIsaac, *The Family Conciliation Court of Los Angeles County*, Family Law Symposium, L.A. Superior Court, 55, 60 (1981) (hereinafter "McIsaac, Symposium Article") (describing branch offices of Los Angeles Family Conciliation Court). *Contra*, those jurisdictions in which mediation or conciliation services are authorized, but implemented only by local order or ordinance. *E.g.*, Ariz. Rev. Stat. Ann. sec.25-381.03; Fla. S.B. 439 sec. 2 (Eff. July 1, 1982); Fla. Stat. 61.21; Ind. Code Ann. sec. 31-1-24-1 (Burns); Neb. Rev. Stat. sec.42-803 and -809(1); Ohio Rev. Code sec.3117.01-.03; Or. Rev. Stat. sec.107.520; Utah Code Ann. sec.30-3-15.1.

[47] *E.g.*, Cal. TAsk Force Rep., *supra* note 45, at 6 (20% of reporting counties); Henn. Budget, *supra* note 24, at 2 and 4.

[48] *E.g.*, Cal. Civ. Proc. Code sec.1761 (West); Broward County, Fla., Admin. Order, *supra* note 4, sec.IV.A.; Proposed Wash. H.B. 905, 47th Legis. sec.11 (1982).

[49] *E.g.*, Proposed Wash. H.B. 905, 47th Legis sec.14 (1982) (in discretion of family court); Cal. Task Force Rep., *supra* note 45, at 6 (77% of reporting counties); Henn. County, Minn. D.R. Services Memo, *supra* note 5, secs. I.D. and II.A; McIsaac Symposium Article, *supra* note 46, at 63. *Contra*, D.R. Policies, Hennepin County, Minn. Dept. of Court Services, Domestic Relations Division (May 5, 1981) hereinafter "Henn. County D.R. Policies") *Cf.*, Rev. Code Wash. sec.26.12.190 (conciliation provision). These provisions are important, in view of statutory restrictions on frequency of motions to modify orders. *E.g.*, Ariz. Rev. Stat. Ann. sec.25-332(B) (1 year); Colo. Rev. Stat. sec.14-10-131(1) (2 years); Proposed Mich. H.B. 4870 sec.17(1)(c) (1982 Session) (2 years).

[50] *E.g.*, Broward County, Fla., Admin. Order, *supra* note 4, sec.IV.A.

[51] *Cf.*, Mich. Stat. Ann. sec.25.123(b) (conciliation provision).

[52] *E.g.*, Cal. Civ. Proc. Code sec.1761 (West). *Cf.*, Ariz. Rev. Stat. Ann. sec.25-381.09 and .18B; Ohio Rev. Code sec.3117.05(A); Rev. Code Wash. sec.26.12.100 and .190; Utah Code Ann. sec.30-3-16.2 (conciliation provisions).

[53] See generally, Fisher and Ury, *Getting to Yes*, ch.1 (1981).

[54] *E.g.*, Broward County, Fla. Admin. Order *supra* note 4, sec.II (maximum 60 days). *Cf.*, Ariz. Rev. Stat. Ann. sec.25-381.18 and .22 (renewable 60 days); Iowa Code sec.598.16 (60 days); Or . Rev. Stat. sec.107.540 (45 days); Pa. Stat. Ann. tit. 23 sec.202 (Purdon) (maximum 3 sessions).

[55] *E.g.*, Cal. Task Force Rep., *supra* note 45, at 6-7 (modal number of sessions available is 6; average length of sessions is 1.5 hours); Henn. County D.R. Policies, *supra* note 49 (mediation services limited to four months per case).

[56] *E.g.*, Broward County, Fla. Admin. Order, *supra* note 4, sec.IV.D. (only one session is mandatory); Henn. County D.R. Policies, *supra* note 49 (limit one session where parties not subject to court order to mediate); McIsaac Symposium Article, *supra* note 46, at 63 (marathon model).

[57] *E.g.*, Henn. Budget, *supra* note 24, at 1-2.

[58] *E.g.*, Staff Meeting Notes and Policies, Hennepin County, Minn., Dept. of Court Services, Dom. Rel. Div. (Oct. 1, 1980) (hereinafter"Henn. County Staff Policies").

[59] *E.g.*, Cal. Civ. Code sec.4607(a) (West); Hawaii Procedure, *supra* note 4; Nev. Proposed Procedure, *supra* note 4, sec.1.

[60] *Cf.*, Rev. Code Wash. sec.26.12.200 (conciliation provision); Wisc. Stat. Ann. sec.767.081 (mandatory counseling requirement for all dissolution petitioners); Ariz. Rev. Stat. Ann. secs.25-381.14 and .23 (judges by local rule may require attendance at one or more conciliation conferences).

[61] *E.g.*, Cal. Civ. Proc. Code secs.1761, 1763 and 1766 (West); Broward County, Fla., Admin. Order, *supra* note 4, sec.IV.C. and E.2; Proposed Wash. H.B. 905, 47th Legis. sec.11 (1982). *Cf.*, Ariz. Rev. Stat. Ann. sec.25-381.14; Iowa Code sec.598.16 (G.A.L. may also request order); Mont. Code Ann. secs.40-3-121 and -125(1); Neb. Rev. Stat. sec.42-817; N.D. Cent. Code sec.27-05.1-09 and -10; Ohio Rev. Code sec.3117.06(A); Or. Rev. Stat. sec.107.550(1) and .570; Pa. Stat. Ann. tit. 23 sec.202 (Purdon); Utah Code Ann. sec.30-3-16.1 and .2; Rev. Code Wash. sec. 26.12.100 and 150; Proposed Kans. H.B. 2706 sec.8(c) (1982 Session) (conciliation provisions).

[62] *E.g.*, Conn. Gen. Stat. sec.46b-53 (G.A.L. may also request order).

[63] *E.g.*, Conn. Gen. Stat. sec.46b-10; Broward County, Fla., Admin. Order, *supra* note 4, sec.IV. B and C; Family Court Study of Custody Resolution Through Mediation, Family Court, First Cir., Hawaii (March 31, 1981) (hereinafter referred to as "Hawaii Study") (court assigns parties randomly to mediation, social investigation, or self-selection groups); Proposed Wash. H.B. 905, 47th Legis. sec.15 (1982). *Cf.*, Ariz. Rev. Stat. Ann. secs.25-381.19 and .23; Iowa Code sec.598.16; Mass. Gen. Laws Ann. ch. 208 secs.1A and 1B (West); Mont. Code Ann. sec.40-3-127(3); N.H. Rev. Code Ann. sec.458: 17II.(b) (judge may appoint G.A.L. who may utilize expert); Neb. Rev. Stat. sec.42-822; Or. Rev. Stat. sec.107.540; Utah Code Ann. sec30-3-17 (conciliation provisions).

[64] *E.g.*, Cal. Civ. Proc. Code secs.1761 and 1763; Conn. Gen. Stat. sec.46b-53. *Cf.*, Ariz. Rev. Stat. Ann. sec.25-381.09; Mont. Code Ann. sec.40-3-121; Neb. Rev. Stat. sec.42-812; N.D. Cent. Code sec.27-05.1-06; Ohio Rev. Code sec3117.05(A); Utah Code Ann. 30-3-16.2; Rev. Code Wash. sec.26.12.100 (conciliation provisions).

[65] *E.g.*, Henn. County D.R. Policies, *supra* note 49; Dane County, Wisc. FCCS brochure.

[66] See statutes collected at note 45, *supra*.

[67] *E.g.*, Cal. Civ. Proc. Code sec.1746 (West); Henn. County D.R. Policies, *supra* note 49. *Cf.* Mont. Code Ann. sec.40-3-122(3); Neb. Rev. Stat. sec.42-815; Ohio Rev. Code sec.3117.05(D); Rev. Code Wash. sec.26.12.130 (all requiring other government agencies to refer all cases to conciliation court that fall within the latter's jurisdiction).

[68] *E.g.*, Proposed Mich. H.B. 4870 sec.13(1) (1982 Session).

[69] *E.g.*, requirement that attorneys file detailed briefs at pretrial conference (Conversation with Joseph Connelly, *supra* note 5).

[70] *Cf.*, Mont. Code Ann. sec.40-4-104(1)(c); Neb. Rev. Stat. sec.42-360 (conciliation provisions).

[71] *E.g.*, Hawaii Mod. Instruction *supra* note 36; Nev. Proposed Procedures, *supra* note 4, sec.1. *Cf.*, N.D. Cent. Code sec.27-05.1-06 (conciliation provision).

[72] *E.g.*, Proposed Mich. H.B. 5257 (1982 Session).

[73] *E.g.*, Proposed Mich. H.B. 4870 sec.11(6) (1982 Session).

[74] *E.g.*, Proposed Mich. H.B. 4870 sec.5(b) and (c) (1982 Session); Dane County, Wisc. FCSS brochure, *supra* note 5.

[75] *E.g.*, Comments during conference sessions at AFCC winter, 1981 conference in Ft. Lauderdale, Fla. For further discussion of conciliation provisions, see Janis K. Alton, *Conciliation Court Statutes in the United States*, unpublished paper prepared for Prof. Jay Folberg (March 31, 1980).

[76] *E.g.*, Ariz. Rev. Stat. Ann. secs.25-381.18 and .22 (60 days); Cal. Civ. Proc. Code sec.1770 (30 days); Mont. Code Ann. sec.40-3-127(1) (30 days); Neb. Rev. Stat. sec.42-821 (30 days); N.D. Cent. Code sec.27-05.1-18 (90 days); Or . Rev. Stat. secs.107.540 and .560 (45 days); Utah Code Ann. sec.30-3-16.7 (60 days); Rev. Code Wash. sec.26.12.190 (30 days); Proposed Wash. H.B. 905, 47th Legis secs.13 and 14 (1980) (30 days); McIsaac Symposium Article, *supra* note 46, at 63 (60 days for post-dissolution custody and visitation disputes in Los Angeles County).

[77] *Id.* In Arizona, the 60-day stay is available to a party no more than once a year. Ariz. Rev. Stat. Ann. sec.25-381.22.

[78] *E.g.*, all those cases where an attempt at mediation is mandatory, notes 59-63, *supra*. Also, N.D. Cent. Code sec.27-05.1-06; Ohio Rev. Code sec.3117.07; Wisc. Stat. Ann. sec.767.083(1).

[79] *E.g.*, Ariz. Rev. Stat. Ann. secs.25-381.18 and .22; Utah Code Ann. sec.30-3-16.7; Rev. Code Wash. sec.26.12.190 (maximum stay of 90 days unless both parties consent).

[80] *E.g.*, Ariz. Rev. Stat. Ann. secs.25-381.18 and .22; Rev. Code Wash. sec.26.12.190.

[81] *E.g.*, Neb. Rev. Stat. sec.42-821(2); N.D. Cent. Code sec.27-05.1-18; Or. Rev. Stat. sec.107.560(1).

[82] *Cf.*, Utah Code Ann. sec.30-3-16.7 (conciliation provision).

[83] *E.g.*, Broward County, Fla., Admin. Order, *supra* note 4, sec.IV,C; Proposed Wash. H.B. 905, 47th Legis sec.14 (1982). *Cf.*, Neb. Rev. Stat. sec.42-821; Or. Rev. Stat. sec.107.560(1); Rev. Code Wash. sec.26.12.190 (conciliation provisions).

[84] Conn. Gen. Stat. sec.46b-53.

[85] *Cf.*, Wisc. Stat. Ann. sec.767.083(1).

[86] Hawaii Procedure, *supra* note 4.

[87] Hawaii Mod. Instruction, *supra* note 36.

[88] Notes 86 and 87, *supra*. And in The South District of Los Angeles Superior Court, no motion or Order to Show Cause is set for hearing unless the pleadings are accompanied by a "Certification re Compliance with Civil Code Sec. 4607." (newspaper clipping provided by Hugh McIsaac; procedure began Oct. 1, 1981).

[89] Pearson and Thoennes, *The Benefits Outweigh The Costs*, 4 Family Advocate 26, 29 (Winter, 1982).

[90] *Id*.

[91] Note 121, *infra*.

[92] *But see*, note 126, *infra*.

[93] Depending upon the mediator and the policy of the mediation agency, nonparties such as new partners, children, neighbors, employers, relatives, school teachers and private therapists may be included in one or more of the mediation sessions. *E.g.*, Cal. Civ. Proc. Code secs.1763(e) and 1766 (West); Conn. R. Civ. Proc. 484; Broward County, Fla., Admin. Order, *supra* note 4, sec.IV.A.1(d) and E.3; Proposed Wash. H.B. 905, 47th Legis. sec.12 (1982); Nev. Proposed Procedure, *supra* note 4, sec.2; Conn. Ann.

Rep., *supra* note 3; Henn. Budget, *supra* note 24, at 1; Custody Mediation, Henn. County, Minn. Dom. Rel. Div., Dept. of Court Services 2 (Mar.25, 1976) (hereinafter "Henn. County Custody Mediation"); Cal. Task Force Rep., *supra* note 45, at 8-9; McIsaac Symposium Article, *supra* note 46, at 59-62. *Cf.*, Ariz. Rev. Stat. Ann. sec.25-381.11(5) and .16D; Mont. Code Ann. secs. 40-3-122(2)(e) and -125(1); Neb. Rev. Stat. secs. 42-814(5) and -817; Ohio Rev. Code secs.3117.05(c)(4) and .06(A); Utah Code Ann. secs.30-3-16.1 and -16.3(5); Rev. Code Wash. sec.26.12.120(5) and .150 (conciliation statutes authorizing order to non-party to attend conciliation conference).

[94] *E.g.*, Cal. Civ. Code sec.1747 (West); Conn. Gen. Stat. sec.46b-11; Broward County, Fla., Admin. Order, *supra* note 4, sec.IV.E.4. *Cf.*, Ariz. Rev. Stat. Ann. sec.25-381.6; Mont. Rev. Code Ann. sec.40-3-116(1); Neb. Rev. Stat. sec.42-810; N.D. Cent. Code sec.27-05.1-12; Ohio Rev. Code sec.3117.06(c); Or. Rev. Stat. sec.107-600(1) (conciliation statutes closing hearings to all but parties, their counsel and witnesses).

[95] *E.g.*, Broward County, Fla. Admin. Order, *supra* note 4, sec.IV.E.3; Nev. Proposed Procedure, supra note 4, sec.2 (file closed to counsel unless both parties stipulate otherwise). *Cf.*, Utah Code Ann. sec. 30-3-17.1 (conciliation provision).

[96] *E.g.*, Minn. Stat. sec.484.65(9); Staff Mtg. Policies, Henn. County, Minn. (Oct. 1, 1980). *Cf.*, Ariz. Rev. Stat. Ann. sec.25-381.07(2); Wash. Rev. Code sec.26.09.030 (conciliation provisions).

[97] *E.g.*, where mediators are hired under statutory designation as custody investigators or probation supervisors. See discussion at notes 120 and 121, *infra*.

[98] *E.g.*, Colo. Rev. Stat. sec.14-10-124.

[99] *See*, F.R.E. 501.

[100] *See*, F.R.E.408 and, *e.g.*, Wisc. Stat. sec.904.08.

[101] *E.g.*, Broward County, Fla. Admin. Order, *supra* note 4, sec.IV.E.5; Proposed Mich. H.B. 4870 sec.13(3) (1982 Session); Nev. Proposed Procedure, *supra* note 4, sec.2. *Cf.*, Ariz. Rev. Code Ann. sec.25-381.16D; Mont. Rev. Code Ann. sec.40-3-116; Mich. Stat. Ann. sec.25.123(9)(1); Or. Rev. Stat. sec.107.600; Pa. Stat. Ann. tit.23 sec.704(Purdon); Wisc. Stat. Ann. sec.767.081 (conciliation provisions).

[102] *E.g.*, Cal. Civ. Code sec.4607(c) (West); Cal. Civ. Proc. Code sec.1747 (West); Conn. Gen. Stat. sec.46b-53(c); Broward County, Fla., Admin.

Order, *supra* note 4, sec.IV.E.5; Proposed Mich. H.B. 4870 sec.13(3) (1982 Session). *Cf.*, Colo. Rev. Stat. sec.14-12-105; Neb. Rev. Stat. sec.42-810(1); N.D. Cent. Code sec.27-05.1-13; Mont. Code Ann. sec. 40-3-116(1); Mich. Stat. Ann. sec.25.123(9)(1); Pa. Stat. Ann. tit. 23 sec.703(Purdon); Utah Code Ann. sec.30-3-17.1 (conciliation provisions).

[103] *E.g.*, Conn. Gen. Stat. sec.46b-53(c); Broward County, Fla. Admin. Order, *supra* note 4, sec.IV.E.5.; Proposed Mich. H.B. 4870 sec.13(3) (1982 Session); Nev. Proposed Procedure, *supra* note 4, sec.2. *Cf.*, Ariz. Rev. Stat. Ann. sec.25-381.16D; Colo. Rev. Stat. sec.14-12-105; N.D. Cent. Code sec.27-05.1-13; Mont. Code Ann. sec.40-3-116(1); Utah Code Ann. sec.30-3-17.1; Wisc. Stat. Ann. sec.767.081 (conciliation provisions).

[104] *Cf.*, *Fenton v. Howard*, 118 Az. 119, 575 P.2d 318,320 (1978), interpreting Ariz. Rev. Stat. Ann. sec.25-381.16; Colo. Rev. Stat. sec.14-12-105; Mont. Code Ann. sec.40-3-116(1); N.D. Cent. Code sec.27-05.1-13 (conciliation).

[105] *E.g.*, Broward County, Fla. Admin. Order, *supra* note 4, sec.IV.E.3;

[106] *E.g.*, Conn. Gen. Stat. sec.46b-10; Nev. Proposed Procedure, *supra* note 4, sec.2. *Cf.* Ariz. Rev. Stat. Ann. sec.25-381.16D; Ill. Ann. Stat. ch. 40 sec.404(b) (Smith-Hurd); Iowa Code sec.598.16; Mich. Stat. Ann. sec.25.123(9)(1); Neb. Rev. Stat. sec.42-808(2)(a); N.D. Cent. Code sec.27-05.1-14; Pa. Stat. Ann. tit. 23 sec.703 (Purdon); Wisc. Stat. Ann. sec.767.081 (conciliation).

[107] *E.g.*, *Fenton v. Howard*, *supra* note 104 (state's interest in preserving confidentiality may override interest of parties in seeking mutual waiver of privilege); Broward County, Fla. Admin. Order, *supra* note 4, secs.I.B. and IV.E.5; Proposed Mich. H.B. 4870 sec.13(3) (1982 Session).

[108] *E.g.*, "All communications, verbal or written, between disputants and from disputants to counselors, the court, attorneys, doctors or others engaged in the conciliation proceedings, made in conciliation conferences, hearings, and other proceedings had pursuant to the conciliation authority shall be privileged and confidential." Broward County, Fla. Admin. Order, *supra* note 4, sec.IV.E.5. *Cf.*, Or. Rev. Stat. sec.107.600 (conciliation).

[109] *E.g.*, Colo. Rev. Stat. Sec. 13-90-107 (1) (e).

[110] *E.g.*, Colo. Rev. Stat. Sec. 19-10-112.

[111] *E.g.*, Id.; Colo. Rev. Stat. Sec. 12-63. 5-115.

[112] The Mediation Agreement used by The Family Court Counseling Service, Dane County, Wisconsin, reflects this strategy.

[113] See. F.R.E. 408 and, e.g., Wisc. Stat. sec.904.08.

[114] *Id.*

[115] *E.g.*, Staff Mtg. Policies, Henn. County, Minn. (Oct. 1, 1980).

[116] Probably the simplest and most effective such measure is to house mediation services in a totally separate unit from investigatory or evaluative services. *E.g.*, Broward County, Fla.; Admin. Order, *supra* note 4, sec.I.

[117] *E.g.*, Mediation Agreement form in use by Family Court Counseling Service, Dane County, Wisc.; Proposed Mich. H.B. 4870 sec.15 (1982 Session).

[118] See note 106, *supra*. *Cf.*, Mich. Stat. Ann. sec.25.123(9).

[119] Cal. Task Force Rep., *supra* note 45, at 10-11.

[120] Staff Mtg. Policies, Henn. County, Minn. (Oct. 1, 1980).

[121] *E.g.*, Henn. County, Minn. D.R. Services Memo, *supra* note 5, sec.I.A.; This is the practice in 90% of reporting counties in California. Cal. Task Force Rep. *supra*, note 45, at 11. *Cf*. Ohio Rev. Code sec.3117.03(A).

[122] Cal. Bar Task Force Rep., *supra* note 45, at 10-11.

[123] *E.g.*, O.J. Coogler, *Structured Mediation in Divorce Settlement* 27-28, 119-20 (1981); I. Ricci, *Mom's House, Dad's House* 151 (1980). Also, conversation with Henry Ellson, California lawyer-mediator, at AFCC conference, Ft. Lauderdale, Fla., Dec. 4, 1981.

[124] This confusion was widely discussed on and off the podium at the AFCC conference, Ft. Lauderdale, Fla. (Dec. 2-5, 1981).

[125] McIsaac Symposium Article, *supra* note 46, at 59; Cal. Task Force Rep., *supra* note 45, at 7-8.

[126] *E.g.*, Cal. Civ. Code sec.4607(d) (West); Cal. Civ. Proc. Code sec.1747 (West). *Cf.*, Ariz. Rev. Stat. Ann. sec.25-381.16D; Mont. Code Ann. sec.40-3-116(1); Neb. Rev. Stat. sec.42-810(1); Ohio Rev. Code sec. 3117.06 (conciliation).

[127] *E.g.*, Guidelines for Custody/Visitation Conferences, Los Angeles Conciliation Court, 5.

[128] Note the practice in some jurisdictions of attorneys attending mediation sessions with their clients. Conn. R. Civ. Proc. 481; Conn. Ann. Rep., *supra* note 3, at 7-8. *Cf.*, Ariz. Rev. Stat. Ann. sec.25-381.16D (conciliation). See authority cited at note 58, *supra*.

[129] *E.g.*, Broward County, Fla. Admin. Order, *supra* note 4, sec.IV.E.7; Proposed Mich. H.B. 4870 sec.13(2) (1982 Session); Nev. Proposed Procedure, *supra* note 4, sec.3(a).

[130] *E.g.*, Cal. Civ. Proc. Code sec.1764 (West); Broward County, Fla. Admin. Order, *supra* note 4, sec.A.2. *Cf.*, Ariz. Rev. Stat. Ann. sec.25-381.12 and .13 (conciliation). *Cf.*, Supreme Court Committee on Matrimonial Litigation *Phase Two, Final Report*, Supplement to N.J. Law J. 1 (July 16, 1981) (recommending use of bar-staffed Early Settlement Program to assist *pro se* litigants in setting or narrowing issues for trial).

[131] *E.g.*, Minn. R.Proc. (Fam. Ct.) 1.02.

[132] *E.g.*, Conn. Ann. Rep., *supra* note 3, at 2.

[133] *E.g.*, Cal. Civ. Code sec.4607(b) (West); Cal. Civ. Proc. Code sec.1745 (a)(1) (West); Conn. Gen. Stat. secs.46b-3 and -53; Proposed Mich. H.B. 4870 sec.13(4) (1982 Session); Proposed Nev. Procedure, *supra* note 4, sec.7(a) *Cf*. Or. Rev. Stat. sec. 107.610 (concilation); R.I. Gen. Laws sec.8-10-7 (court establishes counselor qualifications).

[134] *E.g.*, Cal. Civ. Proc. Code sec.1745(a)(2) (West) (two years); Proposed Nev. Procedure, *supra* note 4, sec.7(b) (two years).

[135] *E.g.*, Cal. Civ. Proc. Code sec.1745(b) (West); Conn. Gen. Stat. sec.46b-10; Henn. County, Minn. Position Description (may substitute bachelor's degree and three years experience for M.S.W.); Proposed Mich. H.B. 4870 sec.13(4) (1982 Session) (may substitute 5 years family counseling experience for master's degree); Proposed Nev. Procedure, *supra* note 4, sec.7; Cal. Task Force Rep., *supra* note 45, Fig. 3 (21% reporting counties employ bachelor's degreed staff; 6% utilize lawyers with MFCC licensure or family law experience).

[136] *E.g.*, Conn. Ann. Rep., *supra* note 3, at 2; McIsaac Symposium Article, *supra* note 46, at 57; Proposed Mich. H.B. 4870 sec.19(3)(b) (1982 Session) (requirement that state friend of the court administrative bureau provide mediator training).

[137] *E.g.*, Conn. Ann. Rep. supra note 3 at 2.

[138] *E.g.*, *Id*.

[139] *E.g.*, Orientation Booklet, Hennepin County, Minnesota Department of Court Services, D. R. Div.

[140] To date, no authority has been found utilizing this alternative.

[141] *E.g.*, Cal. Civ. Code sec.4607(b) (West).

[142] *E.g.*, Cal. Civ. Proc. Code sec.1744(d) and (f) (West).

[143] *E.g.*, Cal. Civ. Proc. Code sec.1744(a) (West); Broward County, Fla., Admin. Order, *supra* note 4, sec.I.A.

[144] *E.g.*, Cal. Civ. Code sec.4607(b) (West); Conn. Gen. Stat. secs.46b-10 and -53; Hawaii Procedure, *supra* note 4; Directory: New Jersey Alternative Dispute Resolution Projects, Comp. by Elizabeth Broady, Asst. Dean, Rutgers Law School (Feb., 1982 Draft) (reporting practice of Judge Serpentelli of Ocean County District Court to refer to psychiatrist for mediation). *Cf.*, Ariz. Rev. Stat. Ann. sec.25-381.24; Hawaii Rev. Code sec.571-6(b); Iowa Code sec.598.16; Mont. Code Ann. sec.40-3-124(1) and -125(3); Neb. Rev. Stat. sec.42-360 and -819; Or . Rev. Stat. secs.107.530(1) and .615(2); N.H. Rev. Stat. Ann. sec.167-B; Ohio Rev. Code sec.117.06(D); Pa. Stat. Ann. tit. 28 sec.202 (Purdon); R.I. Gen. Laws sec.8-10-7; Utah Code Ann. sec.30-3-17; Rev. Code Wash. secs.26.12.170 and .22; Wisc. Stat. Ann. sec.767.081; Proposed Kans. H.B. 2706 sec.8(c) (1982 Session) (conciliation).

[145] *E.g.*, Hawaii Procedure, *supra* note 4; Henn. County, Minn. Orientation Booklet, D.R. Div. Dept. of Court Services. *Cf.*, Mont. Code Ann. sec. 40-3-124(1); Neb. Rev. Stat. sec.42-360; Or . Rev. Stat. sec.107.530; Rev. Code Wash. sec.26.12.220 (conciliation).

[146] *E.g.*, Cal. Civ. Code sec.4607(e) (West).

[147] *E.g.*, Henn. Budget, *supra* note 24.

[148] Note 126, *supra*.

[149] *E.g.*, Nev. Proposed Procedure, *supra*, note 4, sec.3(c). *Cf.*, Ohio Rev. Code sec.3117.06(D); Utah Code Ann. sec.30-3-16-7 (conciliation provisions).

[150] *E.g.*, Broward County, Fla. Admin. Order, *supra* note 4, sec.IV.E.3. *See also*, note 93, *supra*.

[151] Note 121, *supra*. Also, Broward County, Fla. Admin. Order, *supra* note 4, sec.IV.E.2 (results only are reported). *Cf.*, Ariz. Rev. Stat. Ann. sec. 25-381.16B (conciliation provision; results only).

[152] *E.g.*, Cal. Civ. Code sec.4607(d) (West); Mediation Agreement form in use by Family Court Counseling Service, Dane County, Wisc.

[153] *E.g.*, Cal. Civ. Code sec.4607(a) (West).

[154] *E.g.*, Colo. Rev. Stat. sec.24-10-101 *et seq*. See generally, 81A C.J.S. *States* sec.126 (1977).

[155] *E.g.*, Fla. S.B. 7 sec.6 (1981 Session).

[156] *E.g.*, Code of Ethics adopted by Colorado Council of Mediation Organizations (1982).

[157] *E.g.*, Orientation Booklet, Hennepin County, Minn. Dept. of Court Services, Dom. Rel. Div.

[158] *E.g.*, Cal. Civ. Code sec.4607(e) (West).

[159] E.g., Marital Mediation Rules, Family Mediation Association, sec. 41, published in Coogler, Structured Mediation in Divorce Settlement, 128 (1981).

[160] *E.g.*, Hawaii Study, *supra* note 63; Proposed Mich. H.B. 4870 secs.5(a) and 19(3) (1982 Session). *Cf.*, Hawaii Rev. Stat. sec.571-5; Mich. Stat. Ann. sec.25.123(11) (conciliation provisions).

[161] *Cf.*, Mich. Stat. Ann. sec.25.123(11) (conciliation provisions).

[162] *E.g.*, Proposed Mich. H.B. 4870 sec.5(a) and 19(3) (1982 Session).

[163] *E.g.*, Conn. Ann. Rep., *supra* note 3, at 16; Henn. Budget, *supra* note 24, at 4; Los Angeles Conciliation Court Ann. Rep. 2 (1980)

[164] *E.g.*, Domestic Relations Division Services, Hennepin County, Minn., sec. VI "The Divorce Experience" (April 28, 1980).

[165] *E.g.*, Los Angeles County Committee to Implement A.B. 1480, *Cooperative Parenting Following Dissolution: Your Child Needs Both of You* (Pamphlet available from L.A. Conciliation Court).

[166] *E.g.*, McIsaac Symposium Article, *supra* note 46, at 57.

"WHERE AND HOW - CONCILIATION COURTS"

FRANK A. ORLANDO, President, Association of Family and Conciliation Courts - Circuit Court Judge - Supervising Judge, Family Conciliation Unit, Fort Lauderdale, Florida.

This presentation is designed to explain conciliation courts and/or court-connected mediation programs, their organization and objectives and to comment on the results of programs in Florida and California. This presentation was not developed in a scholarly or academic manner but is purposely designed as a position statement concerning the need for increased court-connected mediation programs in a clear and concise manner, hopefully, to be understood by laymen as well as members of the legal profession. We are all aware of the problems which exist in the trial courts of this nation today. Overcrowded dockets and case backlogs are major problems which threaten to severely limit the efficiency of the judicial process.

Chief Justice Burger stated in 1978 that "today, American courts are hopelessly unequipped to handle the tremendous workloads imposed on them by our burgeoning population and modern technology...". Former Chief Justice Overton of the Florida Supreme Court maintains that "Florida, too, is deeply affected by this law explosion with a 30% caseload increase in its trial courts and almost a 100% caseload increase in its appellate courts since 1972." Fortune Magazine has stated that the machinery of American justice is collapsing; and "unless it is repaired quickly and thoroughly, the rule of law itself may disappear." Justice Burger in his "Annual Report on the State of the Judiciary" (January, 1982), urged the increased use and study of alternative methods such as mediation, conciliation and arbitration in such matters as divorce, child custody and adoptions.

Conciliation courts are a vehicle whereby many family-related cases, particularly dissolution of marriage matters, can be settled without the necessity of the adversary, time-consuming and expensive court process.

Before getting to the specifics of these programs, let me first tell you what conciliation courts and mediation programs are not. They are not:

1. The creation of a new court;
2. Divorce by social worker;
3. An attempt to replace the role of the attorney with a marriage counselor;
4. Long, drawn-out marriage counseling sessions;
5. Designed with the specific intent of requiring reconciliation of the parties, or
6. Required of all persons involved in marriage dissolutions.

It is necessary to set out what we are not talking about at the outset, since there does exist confusion with reference to what these services are. Within the state and local mental health agencies, there are many counseling-type programs. None of these have the legal authority or capability to perform the mediation process. Private practitioners in the counseling fields also do not have the legal authority, and in most cases, the ability to perform the mediation responsibility.

Family disputes are unique among judicial cases. They usually involve complex personal resolutions between people who have no written agreement to govern their relationship, little education to prepare them for dealing with the conflict arising within the relationship, and most importantly, an extra-ordinary emotional investment. Dissolution cases usually involve three legal relationships.

1. The relationship of husband and wife;
2. The relationship of parents, and
3. The relationship of mother and father.

The judicial process can with relative ease terminate the legal relationship of husband and wife, but rarely in a family dispute is the parent-child relationship or the mother-father relationship terminated. Many judges are uncomfortable with family cases, and most would prefer not to serve in a domestic relations or juvenile division, perhaps for good reason. Judges are accustomed to resolving issues of fact, applying the law and bringing an end to conflict by making judicial decisions. Family-related cases rarely end with finality. Nobody wins, and seldom is anyone really satisfied with the decision, including the judge and the attorney.

Similarly, few attorneys relish family law cases. Attorneys are rarely prepared to personally and professionally deal with the emotional taxation of contested family disputes. They sometimes find their commitment to vigorous advocacy changed by the dual recognition that in the long run, no one can truly win the case, and the vigorous advocacy, though demanded by the client, may deepen the scar. The parties themselves are rarely entirely happy with the result of the adversary process. Anger distorts perspective and creates false expectations. The need to strike back, to get the last blow, is persistent. Children are involved in the process, but rarely are their true needs and desires represented, and these unsatisfactory results are usually most unsatisfactory where they are concerned.

What I refer to involves about 1/4 to 1/3 of the divorce cases. There were 7,494 dissolutions filed in my circuit (the 17th Judicial Circuit of Florida) in 1981. Approximately 700 cases were referred to the Family Conciliation Unit which is the total capacity of the 2 counselors employed in the Unit. So, as you can see, the majority of dissolutions do not proceed to conciliation. This is not to say that with additional staff, many more cases could not have been referred to the Unit. As you will see from the statistics presented by Hugh McIsaac in California, the Los Angeles Conciliation Court provides a much greater percentage of service to parties seeking dissolutions in Los Angeles.

Of the families involved in my circuit, approximately 80% reached agreement on custody and visiation or resolved the post-judgment dispute without further litigation. 20% of the families involved reached an impasse and returned to the adversary system.

In America today, one out of every six youths lives in a single parent home. Over one million marriages a year end in divorce, and the divorce rate as reported by the Census Bureau is higher than the marriage rate.

Those who could benefit from mediation as opposed to litigation are couples with or without children, and people involved in a second or third marriage, including a growing number of older citizens looking for companionship, and instead finding incompatibility in late-life re-marriages.

So what we have is a cross-section of our community who are involved in a legal-emotional trauma.

Now, what is a conciliation court or court-connected mediation service? It is:

A court-connected counseling program designed to:

1. Preserve family life and marriage, if possible;

2. Resolve conflicts in custody cases, and

3. Assist those who choose to dissolve their husband/wife relationship in preserving their paternal relationship, since you see, this is not a relationship that is terminated by courts and lasts forever.

(NOTE: Property or financial disputes are not included here but many private mediators are available to work out agreements dealing with marital property and money issues.)

The nuts and bolts of the process work as follows.

A married couple is in conflict, and a dissolution petition is filed, or they are considering a dissolution. One or both of the parties, or the court, feels that the conflicts can be resolved and the relationship preserved, or that the relationship can be terminated without stress with professional help.

A Petition for Conciliation is filed, or a court-ordered referral is made. When this happens, the dissolution action (if one is pending) is abated for 60 to 90 days, and the parties meet with a court-employed counselor who is highly qualified and is trained in conflict resolution.

The requirements of attendance vary by state. The general rule is that once a referral is made, both parties must attend.

This is universally true where minor children are involved. If one party does not desire to participate, the counselor is made aware of this; and if during the first session, this does not change, the process is ended. In the program I supervise, 90% of those referred choose to continue.

Everything that goes on in the process is confidential. Attorneys are encouraged to participate but are not required to do so. The sessions last for one hour, and there are usually 3 to 5 of them over a one or two-month period.

The counselor's first objective is to explore with the parties the possibility of reconciliation of the marriage and to help the parties identify their own areas of conflict. If this is possible, they move to an attempt to resolve the conflicts which brought them to the place in which they are in their marriage.

What mediation is is an attempt to save a relationship, if possible, before the process of dissolving it takes place. If reconciliation is not practical, and this is often the case, the process moves to its next objective, that of assisting the parties in ending the relationship of husband and wife amicably, and hopefully, in preserving the ability to communicate and perform as to the role of parents.

The role or relationship of husband and wife in today's society is a very difficult one at which to achieve success. Add to this the pressures and responsibility of being a parent, and you have ready-made conflicts. Without help, many marriages that are sick will die, and the people involved are scarred for the rest of their lives. The mediation process helps people recognize their own areas of incompatibility and conflict and helps them self-cure a sick marriage or end it with dignity, while preserving the role of parent until their children are adults.

One other thing the process does is help people know themselves a little better; and if (and most usually do) they marry again, avoid the pitfalls that destroyed the first marriage.

Children are the victims of divorce. They generally lose in our present system, unless their parents reconcile happily or separate amicably and establish two separate, intact homes where their children can have contact, love and nuturing by a loving parent.

Marital and custody conflicts can usually be resolved when the people in conflict are assisted by an objective, uninvolved person, i.e., the mediator.

In those cases (and there are few) where conflicts cannot be resolved, an effort has been made, the proceedings are confidential, and at most, the parties have lost 2 months in return for this effort. The parties can then return to court for a judicial determination of their conflicts.

In the other cases, the parties, with the counselor's assistance, develop a reconciliation agreement, if they are reconciled, or a separation agreement to end their husband and wife relationship. This can be a total resolving of differences or partial, with the court to resolve such things as property rights, alimony and costs.

A more specific description of the counseling aspect of the program will be covered by Mr. Hugh McIsaac. Suffice it to say that in Phoenix, statistics show that about 75% of those using the program, about 1,200 cases a year, reconcile and stay reconciled through a one-year follow-up period, and custody disputes are rare, as are contested dissolutions, for those using the process. The same is true in other outstanding programs in California. In San Francisco, a contested custody case is now a rarity. If programs work for people there involved in the stress and disruption of divorce, they can work in any state. Why shouldn't people in every state have the same services as people in Arizona, California, Oregon and an isolated circuit in Florida.

The Fort Lauderdale Family Family Conciliation Unit served 547 families in 1981, with each case averaging 3 hours of mediation. We estimate that this saved approximately 1 day of court time in each case, pre or post-judgment. This represents approximately $400 per day (estimate of court time costs) in savings, or approximately $218,000.00. The budget for our program is approximately $95,000 per year (course materials include an exact budget for 1982-83), so you can see, we save court time for other matters and considerable tax dollars.

There are several ways to start a program. The Fort Lauderdale program started with a majority vote of the circuit judges, a local ordinance increasing the filing fee (the Order of the court and the County Ordinance are included in the course materials). In March of 1982, the Florida Legislature declared mediation a valid public policy and authorized state funds to be expended and filing fees to be increased (Senate

Bill 435 is part of the course materials). Other states, like California and Connecticut have a state-wide system and operate under a state law.

Whatever method is used, it is essential that the initial efforts be a partnership, including mental health professionals, the legal profession and court administrators.

In our initial efforts in Florida, I found the bar association to be the least willing to participate; and in fact, many lawyers worked against the program and the legislation. With the passage of time, more and more lawyers have seen the positive benefits that working with the program can have, especially when they see how well our mediators can defuse a highly emotional custody or visitation dispute.

Speaking from my past experience, and from what I have learned through my activities in the Association of Family and Conciliation Courts, I cannot see how any jurisdiction can continue to operate without providing some form of mediation services to divorce litigants.

Let me touch on two other aspects of this program.

Costs: The program must be free to participants but must be staffed by highly competent and trained staff members.

As you are aware, the Fort Lauderdale Family Conciliation Unit is supported by a $6.00 part of the civil filing fee. What other states have done in financing mediation programs is to raise the cost of filing a dissolution by $25.00 in Arizona to $100.00 in Oregon; the result being that the programs are supported by those making them necessary. In my opinion, this is the best way to finance the program, but it is not the only way.

Secondly, why is this a court-connected program?

Many, especially lawyers, will ask why "dump" this counseling stuff on the courts? More properly phrased, they question if professional counseling is a court function. My answer to this is yes! Attorneys in Arizona, California and Oregon seem to agree, since 55 to 65% of all referrals to court counseling in those states come from attorneys. In Fort Lauderdale, the first year we had our program, less than 5% of our cases were attorney referred. In the third year of the program, we are up to 30% and are increasing monthly.

Let's briefly examine the question. It's a fact that the state has a monopoly in the regulation of marriage. A marriage cannot occur without conforming with state law. A marriage cannot end unless the state, through a judge, approves. The state claims to be a third party in a dissolution, mostly because the state has an interest in preserving family life, and in accordance with the parens-patriae doctrine, to protect children in dissolution proceedings.

How many here really think this occurs in divorce litigation (the protection of children)? I do not. Court mediation gives the parties and the judge some help in determining whether or not to end a marriage.

Under the no-fault system, the marriage ends if there exist "irreconcilable differences" between husband and wife. We are still struggling with the meaning of this term. If the state truly has an interest in the preservation of marriage, then I contend that an attempt should be made to properly determine if irreconcilable differences exist, and further, the state should assist the parties in exploring whether or not their differences are truly irreconcilable. If this occurs, then judges could feel more comfortable in taking that serious step that ends a marriage and breaks a family where children are involved.

Many people, especially men, are unable to ask for help or cannot bring themselves to seek counseling. Establishing court-connected services gives people a visible, accessible program.

The court's power is both feared and respected. The court's order will be followed, and mediation can be given a chance as a result of the court's constructive use of its power. The coercive nature of the court's order has not been a problem in our program. In 3 years, we have not had one order of contempt issued as a result of failure to honor a court referral to mediation.

By making this a court-connected service, we have a vehicle to assure that only properly qualified and competent persons are employed in the programs.

Lawyers and judges have a difficult ethical responsibility to make referrals only to those who are competent. The quality of private counseling is uneven. Most states do not license marriage counselors, and there are many who do more harm than good. Even where private counseling is competent and financially available, it is usually geared to individuals, not couples, and is extended over a long period of time. It is rarely mediation oriented and does not focus on the "family."

The cost of private counseling is particularly heightened during the economic strain of a dissolution.

By providing mediation through the court, the judge and the attorneys can be assured of high-quality services over a short time in keeping with judicial calendars and geared toward issues that must be resolved, such as the preservation of the parental role.

Judges are the final gatekeepers before the dissolution of a marriage. Why not try to be assured that at least some of the people involved in divorce are exposed to competent efforts to resolve conflicts before that gate is closed?

It makes good sense to have the program under the court's administrative rule to assure quality and accessibility.

There are no easy answers or sure solutions to the tragedy of family breakdown. If court-connected mediation can successfully reconcile only a small percentage of families who otherwise would utilize the court to terminate their relationship and complicate their role as parents, it may well justify its existence. If court-connected mediation can help dissolving families understand their continuing relationship as parents, children, mothers and fathers, it would be a most worthwhile service of the court. If court-connected mediation can help smooth the edges of a torn family and facilitate agreement so that parents can continue to successfully fulfill their responsibilities toward their children with a minimum of strife and a maximum of understanding and mutual support, then court mediation may be considered a resounding success.

Lastly, if court-connected mediation services help speed the process of divorce litigation by eliminating unnecessary litigation and save local court systems money and time, then they are an absolute necessity in today's economic climate.

The number one person in the United States' judicial system, Chief Justice Warren Burger, has consistently supported the increased use of court-connected mediation in divorce and custody cases. With his leadership and our continued efforts, we should achieve success in establishing this process in every jurisdiction in this nation.

Thank you.

IN THE CIRCUIT COURT OF THE SEVENTEENTH
JUDICIAL CIRCUIT, IN AND FOR BROWARD
COUNTY, FLORIDA

ADMINISTRATIVE ORDER NO. 79 - 25

IN RE: :
FAMILY CONCILIATION UNIT :
______________________ :

Pursuant to a majority vote of the Circuit Judges of the Seventeenth Judicial Circuit on October 13, 1978, approving the concept of a marriage conciliation program, and by virtue of the Ordinance passed by the Broward County Board of County Commissioners on March 20, 1979, determining and declaring the funding and establishment of such a program to be a county purpose, the Family Conciliation Unit of the Seventeenth Judicial Circuit is hereby established as an adjunct service of the courts.

I. PURPOSE

A. The Family Conciliation Unit shall have as its primary functions:

1. The mediation of marital and divorce conflicts.

2. The prevention of needless marriage dissolutions where possible, and if not possible, the reduction of the negative effects and after effects of divorce on husbands, wives, and children.

B. The conciliation procedure is not designed to effectuate delay in legitimate proceedings before the Court or to require parties to participate in the mediation process where no useful purpose can be served; nor is the service designed to force the continuance of a marital relationship against the desires of either spouse; nor is the Family Conciliation Unit authorized to conduct, prepare, or submit evaluations.

The process is designed for the benefit of the parties and their counsel, to present an alternative to the traditional adversary system, and to assist in the mediation of contested issues and the amicable settlement thereof. The service is further designed to assist persons who are ending their marital relationship in preserving their roles as parents and to prevent unnecessary disruption in the lives of their children. The Family Conciliation Unit shall always operate with these principles as primary responsibilities.

II. AUTHORITY

Whenever any controversy exists between persons in a relationship which may, unless a reconciliation is achieved, result in legal separation, dissolution or annulment of the marriage or in the disruption of the household, and there is a minor child of both or either of them whose welfare might be affected thereby, the Family Conciliation Unit shall, upon proper petition or referral by the Court as provided below, have the authority to consult and conduct conferences with the parties thereto and all persons having any relation to the controversy, to make use of appropriate resources, to prepare and submit reports to the Court, and to do all other such things as are necessary to fulfill the purposes and responsibilities of the Unit. If there be no minor child, the Family Conciliation Unit may have such authority upon proper petition showing a genuine need for its services, or upon order of the Court.

Court ordered conciliation proceedings shall not extend beyond sixty days from the date of the referral.

III. FEES

No fee shall be charged for the filing of the petition nor shall any fee be charged by any officer for the performance of any duty pursuant to this Administrative Order.

IV. PROCEDURES

A. Petition Invoking Authority of Family Conciliation Unit. Prior to the filing of any action for annulment, dissolution of marriage, separate maintenance, support and custody, the parties to a domestic relations controversy may jointly file with the Family Conciliation Unit a petition for conciliation services for the purpose of effecting a reconciliation between the parties so as to avoid further litigation over the issue involved.

1. Petition Contents. The petition shall

(a) Allege that a controversy exists between the parties and request the aid of the Family Conciliation Unit to effect a reconciliation or an amicable settlement of the controversy.

(b) State the name and address of the parties and the date of their marriage.

(c) State the name and age of each minor child whose welfare may be affected by the controversy

(d) State the name of any other person who has any relation to the controversy and the address of the person if known

(e) If no minor child is involved, show the need for the services of the Unit and the benefits proposed to be derived therefrom.

2. Blank Forms; Assistance in Preparing and Presenting Petition. The Clerk of the Court shall provide for the use of interested parties blank forms for petitions for conciliation services. The employees of the Family Conciliation Unit shall assist any person in the preparation and presentation of any such petition when requested to do so.

B. Referral of Actions by the Court

Any action for annulment, dissolution of marriage or legal separation in which it appears to the Court that there is a minor child of the parties or either of them whose welfare may be adversely affected thereby, and there appears to be some reasonable possibility of a reconciliation being effected or for amelioration of the effects upon the minor child, may be referred to the Family Conciliation Unit by the Court for proceedings for reconciliation of the parties or amicable settlement of issues in controversy in accordance with the provisions hereof. Such actions in which no minor child is involved may be referred by the Court to the Unit upon a determination that the services thereof may be beneficial to the parties or to the Court.

C. Referral by a General Master

In any proceeding before a General Master for temporary support, custody, visitation or postjudgment proceedings, the General Master, on his or her own motion or on motion of either party, may recommend to the Court having jurisdiction in the case that the case and parties be referred to the Family Conciliation Unit pursuant to the provisions hereof. If both parties consent, a direct referral to the Family Conciliation Unit may be made by the General Master. Such referral shall not diminish the authority of the Court to enter orders of temporary support.

D. Mediation Conference, Time, Place and Notice:

The Director of the Family Conciliation Unit shall fix a reasonable time and place for a mediation conference on the matters in controversy, said conference to be held within ten days of the filing of the petition or order of referral, unless the parties shall agree to an extension of time or the court for good cause shall extend the time for a period not to exceed thirty days. The Director shall cause notice of the filing of the petition or motion and order of referral, and of the time and place of the Conference to be given to the parties.

E. Conduct of Hearing, Recommendations: Aid of Specialists; Expense; Confidential Communications

1. The Mediation conference shall be conducted by the Family Conciliation Unit Director, or a Family Conciliation Unit counselor. Further conferences may be held by agreement of the parties or upon order of the Court.

2. In cases which have been referred to the Family Conciliation Unit by court order, the mediator shall upon the completion of the conference, submit a Progress Report thereon to the Director of the Unit who shall review it and report the results of the conference to the referring Judge. Said judge may order further conferences on request of either party or his own determination of the need therefor.

3. To facilitate and promote the purposes of this Administrative Order, the Unit may, with the consent of both parties, recommend or invoke the aid of appropriate resources, such as physicians, psychologists, social agencies, or other appropriate individuals or agencies. No reports of any such

individual or agency available to the Family Conciliation Unit shall be filed in or become a part of the records of the case. Any such aid shall not be at the expense of the Court or the County.

4. All conferences and other proceedings held pursuant to conciliation authority shall be held in private.

5. All communications, verbal or written, between disputants and from disputants to counselors, the court, attorneys, doctors or others engaged in the conciliation proceedings, made in conciliation conferences, hearings, and other proceedings had pursuant to the conciliation authority shall be privileged and confidential.

6. All records of the Family Conciliation Unit with respect to conciliation proceedings in any case shall be closed and sealed. However, any written conciliation or mediation agreement between disputants may be opened to inspection by either party or his/her counsel upon written authorization of the judge to whom the case was assigned.

7. Any mediation agreement between the parties may be reduced to writing, and with the consent of the parties, a court order may be entered requiring the parties to fully comply therewith.

8. The Honorable Frank A. Orlando, Circuit Judge, is hereby designated as Supervising Judge of the Family Conciliation Unit.

DONE and ORDERED at Fort Lauderdale, Florida, this 5 day of October, 1979.

George W Tedder Jr

GEORGE W. TEDDER, JR., Chief Judge

THE FAMILY CONCILIATION COURT
OF LOS ANGELES COUNTY

Hugh McIsaac, Director
Family Mediation & Conciliation Service

Family Law Department
Los Angeles County Superior Court

A. INTRODUCTION

Established in 1939, the Family Conciliation Court of Los Angeles County as we know it today was one of the first of its kind in the United States. The concept of conciliation has its roots in the ancient ecclesiastical courts and has been recognized for many years by local civil authorities. This concept finds expression in CCP Sections 1730-1772, as amended in 1980, in which is codified the authority under which the Family Conciliation Court functions. In reconciling couples with marital problems and settling differences amicably, the Court benefits the community as well as the immediate individuals involved. In 1980, statutes dealing with conciliation were amended incorporating recommendations from a two-year study by the Family Law Advisory Committee appointed by the State Legislature.

The service is funded totally through the divorce filing fee ($15.00) and the marriage license fee ($5.00), and a filing fee for request for modification of custody and visitation orders ($15.00). The service presently has 25 positions, 18 professional and 7 office staff.

The basic objectives of the Conciliation Court are to:

1. Provide a non-adversarial means of settling conflict within the Superior Court, maximizing participation of the parties involved and giving them maximum responsibility for their own individual and collective lives
2. Help families reconcile and divert from the divorce process.
3. Help families going through the divorce process handle the crisis of dissolution effectively and settle their differences amicably.

4. Make recommendations regarding underage couples applying for marriage.

5. Review public and private policy and programs to make recommendations for the strengthening of family life, both inside and outside the Court system

B. BASIC SERVICES

1. Marriage Counseling

The Conciliation Court provides crisis marriage and family counseling for families who wish to explore alternatives to dissolution and divorce. This service may be obtained by filing a petition with the Conciliation Court requesting the service. The filing of a petition for Conciliation does not stay an action for dissolution of marriage if the dissolution action is filed prior to the filing of the petition for conciliation. However, if the petition for conciliation is filed prior to the filing of a dissolution, no dissolution proceedings may be started by either spouse for a period of 30 days following the Conciliation Court hearing (CCP Section 1770.)

Very often filing for dissolution does not represent a true desire to end the marriage, but is often a cry for help. Nearly 20% of all the filings do not become final. If the couples do not reconcile, very often, one party has not accepted the divorce and needs help in understanding why the other party wants out. Counseling during this period may reduce the acrimony when a reconciliation is not possible. Historically, approximately one-third of the familes who petition for Conciliation Court marriage counseling reconcile, many by signing a marital agreement which freezes the divorce and sets forth the condition for the renewal of the relationship. Approximately one-third of the families are referred to community agencies and private counselors in the community for a longer term counseling than is available through the Conciliation Court, and approximately one-third of the families decide to obtain the divorce. Seventy-five percent of the families who reconcile are still together after one year. The Conciliation Court may see couples from one to six visits, but if the problems appear to exceed the six visits limit, the family will be referred to a community agency or private counselor.

2. Custody and Visitation/Mediation

The Conciliation provides custody/visitation mediation for couples under Section 4607 of the civil code.

This service may be obtained by referral from attorneys using a stipulation form available through the Conciliation Court office (see Attachment B.) All that is required is for the proper information to be entered, signatures of the two attorneys affixed, along with the signatures of the petitioner and respondent. The Conciliation Court will obtain the signature of the judicial officer. The filing of the stipulation enables the family to have a conference at the Conciliation Court in advance of any Court hearing. In addition, the Conciliation Court receives referrals from the Bench at the time of Court hearing.

The procedure for referrals from the Bench are for families to, if in the Central Court, participate in an orientation which includes a discussion of the Conciliation Court service, and the viewing of a videotape discussing the developmental needs of children and how families may best help their children during the divorce process. Dr. Judith Wallerstein, one of the principal researchers on the effects of divorce on children, is interviewed in this 15-minute tape. In th meantime, while the families are observing the orientation tape, attorneys will be meeting with the family counselor assigned to explore the issues in the dispute. The Conciliation Court counselor will generally not meet with an attorney representing one side unless the other attorney is present. After the orientation and the interview with the attorneys, the family, the two parents, are interviewed together, and frequently, separately, in order to obtain their view of the issues involved. If the children are available, the children will be interviewed in order to determine the effect of the divorce on the child and to assess the child's individual needs. The sessions will be concluded with a meeting between the counselor and the two parents in order to work out a written agreement between the parties. Frequently, followup contacts are scheduled with the family when agreement is not arrived at during the initial conference, and significant others, such as grandparents, stepparents, and siblings, etc., are interviewed if they are involved in the life of the child.

Written agreements are signed by the parents and sent to the attorneys for their review by the client who is instructed to take their copy of the written agreement to their attorneys on completion of the agreement. The agreements then are sent to the judicial officer who reviews the agreement and makes into an enforceable court order. The County Clerk will then send copies to the attorneys with instructions that the agreement will become an order of court if no objection is received within ten days of the receipt of the agreement.

Conciliation Court has been successful in resolving 54.5% of the matters referred to Conciliation. Another 15% of the families reach agreement following the Conciliation Court conference and the next court hearing. The final 25% of the families may be referred for a psychiatric evaluation, custody investigation, or probation report. A very high percentage of these families settle their differences upon submission of this report, and less than 2% of all filings will go to trial over the custody issues. For a description of the custody investigation options, see Attachment C.

All contacts with the Conciliation Court are confdiential, and no recommendation or report is made to the trial court in the event an agreement is not effected. The only thing that is shared with the trial court is the written agreement signed by both parties and reviewed by their attorneys.

A followup evaluation of the service is sent to the clients six months after they have developed an agreement. Eighty percent of the families perceive the service to be helpful, or very helpful, and less than 9% perceive the service as "very unhelpful." Persons in the latter category are usually those who needed to have the decision made by the trial court. Attorneys have been very laudatory of the Conciliation Court's assistance, reporting that counseling reduces tensions and materially assists in working out an amicable settlement of property issues. Separating the custody and visitation disputes from the divorce process helps the attorneys focus on the issues involved in the legal dispute - property, support, and other financial issues.

In helping divorced parents reach an amicable agreement, we not only help them and their children, but also save the bench invaluable time, as well as insuring the effective implementation of orders made by the bench. This counseling service is another manifestation of our court's concern for what is in the best interest of the child. But, to serve the child, we cannot overlook the needs of divorcing and divorced parents. This service also helps the court to serve families in deep conflict, rather than merely processing them.

Finally, it should be noted that 55% of the couples seen in 1980 were able to work out a written amicable agreement, with resulting benefits to them and their children. It should also be noted that whereas, traditionally, a court orders people to do and not to do certain things, the court in these cases has allowed the parties an unprecedented degree of self-determination in that the parties themselves with the referring bench's approval, are modifying previously made orders; or, where no such orders have yet been made, the parties in effect, work out their own order. This is consistent with the basic principle in counseling that when crucial decisions are made for people and not with them, the likelihood of compliance is diminished. After all, the goal of all Family Law Department orders is to create conditions of order and harmony among people in conflict. When the court permits the kind of self-determination manifested in these cases, it in no way compromises its own principles. The end result is creating a set of conditions that the parties themselves feel they can live with and are more likely to follow.

Finally, in Los Angeles County, no report is made by the conciliation counselor to the bench when the mediation is not successful, assuring the parties and their attorneys that what is discussed is confidential and will not be used in the adversary process. If both parties want the counselor to consult with the judicial officer and both attorneys following the conciliation process indicate their desire in writing, on occasion such a conference has been arranged; but only at the request, or consent, of the parties themselves. The philosophy of the Los Angeles County Conciliation Court is that all contacts with the Conciliation Court should remain confidential as permitted by law (CCP 1747.) If a psychiatric evaluation on custody investigation is required, the family is referred to the Child Custody Investigations Unit, Probation Department, the Psychiatric Panel, or independent mental health professional qualified to perform these evaluations (see Attachment C.) This procedure helps protect the family from an unwarranted intrusion by the conciliation counselor and emphasizes family self-determination by clearly separating the family conciliation court and trial court roles.

3. Premarital Consent Evaluations

(CC Section 4101) in 1970 the Conciliation Court was involved in establishing a premarital program for all minor couples under the age of 18 applying for a marriage license where judicial consent was required in addition to parental consent. The Conciliation Court works with community agencies and private practitioners to provide the marriage counseling in the community. The Conciliation Court provides an evaluation for the judicial officer once the marriage counseling has been obtained. The effect of this law has been to reduce the number of underage marriages from 3,687 in 1973 to 1,663 in 1980.

The intent of this law is to discourage early marriage, and to insure that couples who marry early have the necessary skills in order to handle the responsibilities of a marital relationship. Over 85% of all couples who marry when one is under the age of 18, will end their relationship in divorce, whereas the divorce rate for all families is 38%. The effect of this law may be reflected by the fact that California's divorce rate has shown a decrease from 6.2 to 6.0 per thousand during the last two years. Some of this reduction may be due to the marital counseling law which has discouraged early marriage, and now these families are not showing up in divorce statistics at a later date.

4. Domestic Violence Restraining Orders and Counseling

The Conciliation Court also provides counseling for families involved in domestic violence disputes, particularly where temporary custody and/or visitation decisions are necessary. The Conciliation Court staff will refer families for ongoing help when domestic violence is an issue in the relationship. Families are referred to the Conciliation Court under CCP Section 527. These families are referred by the bench when facts of the case merits such a referral. Families may also petition for Conciliation Court service using the regular marriage counseling petition.

5. Seminars for Families

The Conciliation Court holds one-day seminars for families going through the process of dissolution. The purpose of these seminars is to help families through an educational model, explore the dynamics of divorce in the individual, family and legal system. The format for the one-day conference has been presentations by attorneys, mental health professionals and persons who have gone through the process of divorce in the morning with small group discussions and workshops in the afternoon. The contents and participants are selected by a local or regional planning group, which include representatives from the bar association, family law section mental health community, schools, PTA's, family service agencies, media, and other interested groups. The response to these seminars has been very positive with over 450 persons attending the last conference which was held in May 1980 in Westwood.

During 1981, the Conciliation Court published a pamphlet entitled, "Cooperative Parenting: Your Child Needs Both of You", developed by an interdisciplinary committee to describe California's new joint custody statute to help families plan for constructive use of the possibilities in joint custody. Attorneys may obtain copies of the Cooperative Parenting Pamphlet through the central office. This pamphlet has received nationwide attention along with the earlier pamphlet developed by the Court, "Parents Are Forever."

The seminar and the publications represent the Conciliation Court's attempt to assist families through an educational process to transit the experience of dissolution. The Conciliation Court is also planning to develop marriage enrichment seminars to help families explore alternatives to dissolution and divorce and to strengthen their marital relationship.

C. CONCILIATION COURT'S JUDGE AND PROFESSIONAL STAFF

The Conciliation Court consists of a Supervising Judge and professional staff which includes the Director of the Family Mediation & Conciliation Service, a Principal Family Counselor supervising the central district, a Principal Family Counselor for Training, Research and Staff Development, and 15 Senior Family Counselors. The staff also includes 10 interns who are either working on hours for licensure or who are completing a masters degree in social work. The function of the Conciliation Court judge is vitally important. While the judges do not engage in counseling, they exercise program control of the Court, and approve of general court policies. In the capacity as a judge, they sign all court orders including the marriage agreement, the custody and visitation agreement, subpoenas and consents for underaged couples.

The professional staff has specialized training in marriage and family counseling and must have at least a masters degree in one of the behavioral sciences and five years of post-master's experience. The Court, in 1978 initiated a training program for behavioral scientists interested in working in the field of family law. Four of the counselors have Ph.D.'s and one of the staff has a law degree.

D. COUNSELING PROCEDURES

1. Attorneys should be aware and should advise their clients that all services of the Conciliation Court are without charge (CCP Section 1765) and that all files, reports, or documents in the Conciliation Court are confidential (CCP Section 1747); no outside party may inspect them, nor are they subject to subpoena or discovery process. Additionally, the Conciliation Court has three Spanish-speaking family counselors and no interpreter is needed for that language. However, if an interpreter is necessary for another language, an interpreter is ordered, and a fee charged. In addition, attorneys should advise their clients that if the parties fail at a conference, they, too, will be charged.

2, Inquiries concerning the Conciliation Court are often received either informally or by the filing of a Petition for Conciliation, without the filing of a petition under the Family Law Act (i.e., Dissolution, Separation, Nullity.) In 1976-77, for example, 40% of the families filing a Petition for Conciliation did not have a dissolution of marriage action pending. About one-half of these arose from an inquiry received by telephone or mail. Where contact is initiated in this manner, an initial conference date is set and the parties notified to appear. The other one-half of the case arose where one or both parties came in to the Conciliation Court personally. When this is done, they are given an immediate short conference to discuss the services available in the Conciliation Court. If the party or parties desire to proceed, they are assisted in filing a Petiton for Conciliation. If both parties are present, a conference date is scheduled, and the conciliation process proceeds as will be described below. If, however, only one is present, a future conference date is scheduled and the other party notified by mail of the date to appear.

3. When a Petition for Dissolution of Marriage (or for Legal Separation) is filed, a "Confidential Counseling Statement" (formerly known as "Confidential Questionnaire") must concurrently be filed and a blank Confidential Counseling Statement served on the Respondent pursuant to the Family Law Act and Rules. The Conciliation Court reviews the Confidential Counseling Statement. In all cases where there are children of the parties under age 18 and an interest in counseling is indicated, the parties are sent two pamphlets, "A Personal Message to Parents" and "Parents Are Forever". If either or both of the parties have requested counseling, they are sent a letter encouraging them to file a Petition for Conciliation. If they do not respond by filing such a petition, no further followup is made. If, however, a Petition for Conciliation is filed, the full conciliation process outlined below is then followed. When the Judicial Council revised the Confidential Questionnaire (Form 1284) and introduced the form now in use ("Confidential Counseling Statement"), the Conciliation Court developed a form statement, "A Personal Message from the Conciliation Court", which attorneys attach to the Confidential Counseling Statement given to clients as a means of advising the client about the availability of the Conciliation Court services.

4. The conciliation conferences are conducted by professional family counselors with the express intention of helping the parties arrive at a reconciliation. However, if reconciliation is not possible, the parties are helped to reach an amicable settlement of problems related

to a permanent separation. The conferences are held in the private offices of the counselors in the courthouse and are usually of one and one-half hours' duration. The total number of conferences per case will vary from one to six with the average being three.

5. At the first conference the parties are seen separately for about one-half hour each to allow them to ventilate their feelings and thereby give the counselors an indication of the areas of important concern. During the last half-hour of the conference the parties are seen together. In subsequent conferences the parties are seen together, with the method being that of encouraging the parties to verbalize their problems to arrive at solutions together (this being the procedure whether or not reconciliation seems possible.) The Conciliation Court has the power, infrequently exercised, to cite third parties for attendance at any of these conferences, (CCP Section 1766.) This may involve family members such as in-laws or adult children, or third parties, (CCP Section 1763.)

6. If after some counseling the parties agree to reconcile, they sign a contract to do those things necessary for a harmonious marriage. Once signed by the parties and the Supervising Judge, it becomes an Order of the Court and may be enforced by a contempt proceeding. If, on the other hand, the parties conclude that they cannot or will not reconcile, the case is closed (CCP Section 1769.) However, where the parties indicate a desire to continue their counseling on an ongoing basis, they may be referred to an outside public or private agency or private practitioner. If this is the case, the outside counselor will be required to furnish the court with a report of his results.

7. Once the Conciliation Court proceedings have started, a blue sheet is inserted in the Family Law file indicating the pendency

of proceedings. While a Marriage Agreement is in effect, neither party can proceed with the dissolution of marriage action except upon termination of the Marriage Agreement. Additionally, and for the full period of its proceedings, the Conciliation Court has the power to request the Family Law file, and if it deems it necessary, may forward the file to the acting counselor.

E. SIGNIFICANT CONCILIATION COURT STATISTICS

Statistical data gathered by the Conciliation Court indicates a leveling in the number of cases seen for marriage counseling, a decrease in the number of premarital consent evaluations, and a sharp increase in custody and visitation counseling.

Since 1954, 125,499 petitions have been filed in the Los Angeles Conciliation Court. Total petitions filed in 1977 were 4,722. In 1978, 4,968 petitions were filed. In 1979, 5,261 families were seen and in 1980, 5,749 families were seen: 1707 for marriage counseling; 2,564 for custody and visitation counseling; 1,473 for premarital consent evaluations and 24 for domestic violence restraining orders. In 1981, 7,138 families were seen: 1,124 for marriage counseling; 4,459 for custody and visitation mediation; 1,501 for premarital consent evaluations; and 54 for domestic violence restraining orders.

It is further interesting to note that in 1980-81 as in past years, a high percentage of all petitions filed were directly due to referrals by attorneys with many of these referrals being made prior to the filing of a dissolution action.

Seventy-five percent of the couples who reconcile still are together after one year, and 55% of the couples referred to the Conciliation Court for custody and visitation negotiate an amicable agreement. Many cases also settle after being seen in Conciliation and during the child custody evaluation phase which are not reflected in the 55% statistic, and requiring all contested custody and visitation matters to go through a Conciliation process encourages private settlement, which in the long-run will hopefully diminish the number of families who contest custody or visitation in court.

F. OTHER CONCILIATION COURT SERVICES TO THE COMMUNITY

1. Branch Offices

In addition to those parties and purposes already mentioned, the Conciliation Court performs various other services for the community. Beginning in 1967, the Conciliation Court established branch offices in several district courts of the Superior Court. This program, introduced on an experimental basis to evaluate the feasibility of providing such a service, has proved to be extremely successful and represents another aspect of the Conciliation Court's desire to make its service easily accessible to the residents of this community. There are now Conciliation Court branches in the following districts: Van Nuys, Torrance, Norwalk, Pomona, Long Beach, Santa Monica, Pasadena and Compton (full-time after February 2, 1981.) A listing of their addresses and telephone numbers follows the last page of this article.

2. Group Counseling

During 1977, the Conciliation Court discontinued its short-term group counseling program (generally conducted during evening hours) because of the cutback in staff. Since 1967, there have been 138 groups involving 724 couples, with 1,358 children among these families. We hope to resume this valuable program.

3. Association of Family & Conciliation Courts (AFCC)

The Los Angeles County Conciliation Court has been responsible for the creation of the Conference of Conciliation Courts, now known as the Association of Family & Conciliation Courts, an interdisciplinary organization of judges, attorneys and court family counselors. Its membership includes judges, attorneys and court counselors from 20 states in the United States, as well as from Canada, Australia, New Zealand and the Philippines. The Association co-sponsored the highly successful Family Law Colloquium in 1979 and 1980, with the Family Law Section of the Los Angeles County Bar Association.

4. Conciliation Courts Review

The Conciliation Courts Review, originally started by the Los Angeles County Conciliation Court, and now the official journal of AFCC, continues to be published in Los Angeles with Meyer Elkin as Editor.

5. Consultant to Other Courts

In addition to the above services, the court continues to serve as a consultant to other jurisdictions, including New York, New Jersey, Missouri, Pennsylvania, Texas, Utah, Hawaii, Montana, Nebraska, Minnesota, Oklahoma, Florida, Canada, Japan, Venezuela, Australia, New Zealand and many counties in California. In this capacity, the Conciliation Court has provided an orientation and training program for counselors appointed to newly created Conciliation Courts. Since 1958, the court provided this service for over 50 conciliation counselors connected with conciliation courts in California and the United States. In addition, the court has provided a similar service to courts outside of California. The Conciliation Court has been visited by several commissioners from other counties seeking to revise their family law systems, including New Zealand, Canada, Italy, United Kingdom and Australia.

6. Referrals for Ongoing Counseling

A successful referral relationship with 16 family service agencies, as well as other qualified community counseling resources, continues to operate effectively. The court additionally makes referrals to private practitioners on the court's referral list. Without these referral resources, to whom the counselor can refer couples when ongoing counseling is indicated, the Conciliation Court program would suffer.

G. CONCLUSION

Little more than two decades ago, a court providing a professional marriage counseling service was unknown, and anyone suggesting such a service would have been labeled an impractical dreamer. Experience has since demonstrated that the Conciliation Court concept, which was born in Los Angeles, is an effective interprofessional approach on the part of the law and behavioral sciences to help families having marital problems. Conciliation Courts are today functioning effectively in diverse jurisdictions, including those in metropolitan and rural areas, as well as those in urban communities. It continues to be the purpose of the Conciliation Court to help families find hope, and where hope exists, to nurture it to a successful conclusion. In this manner, enlightened decisions about marriages can be made with self-awareness and understanding.

ATTACHMENT A

Name, Address and Telephone Number of Attorney(s)

Attorney(s) for

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

IN RE THE MARRIAGE OF

Case No. ____________

____________________ Petitioner

C.C. No. ____________

vs

CONCILIATION COURT
STIPULATION AND ORDER

____________________ Respondent

The aid of the Conciliation Court having been requested to effect an amicable settlement of the problems involved between the above named parties and a court conference having been held thereon in order to maintain an amicable relationship between the parties for the best interests of the child(ren), the parties hereby agree each with the other and with the Conciliation Court as follows:

There is no previous order of the court.

The order/judgment entered ____________ Dept. ____________ [illegible] ________
is modified in the following particulars only:

It is hereby stipulated between the above named parties that:

☐ Custody of the minor child/children ________________________________
(name and birth date)

____

____

is given to ____________________ ____________________

[illegible] ____________

[illegible] ____________

The Children will live with

Mother

Father

[illegible] ____________

[illegible] ____________

☐ The following are non-enforceable agreements, statements and understandings between the parties:

D.R. ______________

NO. ______________

In entering into this stipulation, each acknowledges that it is necessary to do so for the best interests of our child(ren).

In the event that further difficulties arise, and either one or both of us believe that the services of the court may be helpful in solving them, we agree that we will contact the counselor named below and arrange for further conference(s).

Each of us acknowledges that we received a copy of this stipulation and will discuss this stipulation with our attorneys. If no objections are received within 10 days it will be submitted for court signature.

Dated ______________________, 19____.

____
PETITIONER

____
RESPONDENT

____
FAMILY COUNSELOR

ORDER

The foregoing written stipulation between the parties is declared the order of the Court and ordered filed. The

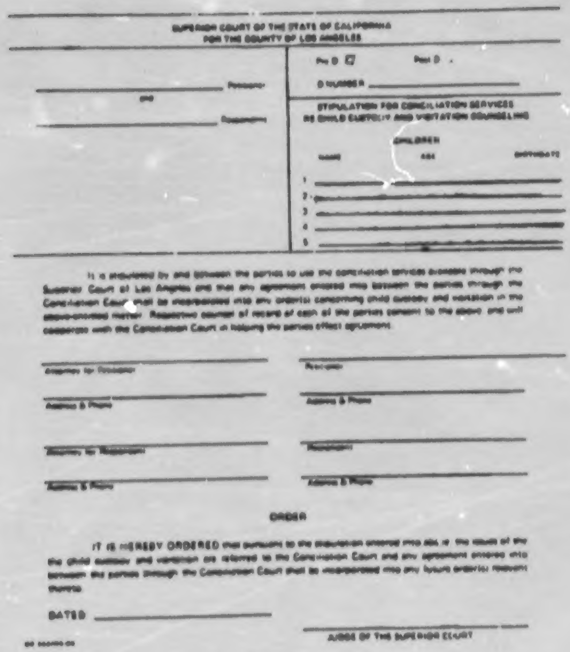
and are ordered to comply with and perform each and all of the terms, conditions, and provisions of the stipulation and agreement. Neither party shall take any further action in any pending family law proceedings in regard to custody and visitation, only, until the Final Visitation Agreement is implemented.

Dated ______________________, 19____

____
JUDGE PRO TEM OF THE SUPERIOR COURT

ATTACHMENT A — Continued

ATTACHMENT B



SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Pre D ☐ Post D

D NUMBER ______________________

______________________ Petitioner

and

______________________ Respondent

STIPULATION FOR CONCILIATION SERVICES
RE CHILD CUSTODY AND VISITATION COUNSELING

CHILDREN

NAME	AGE	BIRTHDATE
1		
2		
3		
4		
5		

It is stipulated by and between the parties to use the conciliation services available through the Superior Court of Los Angeles and that any agreement entered into between the parties through the Conciliation Court shall be incorporated into any order(s) concerning child custody and visitation in the above-entitled matter. Respective counsel of record of each of the parties consent to the above and will cooperate with the Conciliation Court in helping the parties effect agreement.

Attorney for Petitioner	Petitioner
Address & Phone	Address & Phone
Attorney for Respondent	Respondent
Address & Phone	Address & Phone

ORDER

IT IS HEREBY ORDERED that pursuant to the stipulation entered into above, the issues of the the child custody and visitation are referred to the Conciliation Court and any agreement entered into between the parties through the Conciliation Court shall be incorporated into any future order(s) relevant thereto.

DATED ______________________

____
JUDGE OF THE SUPERIOR COURT

[illegible]

(Available through the Conciliation Court, Central District, 974-5524)

ATTACHMENT C

INFORMATION FOR ATTORNEYS

CUSTODY-VISITATION CONCILIATION COURT MEDIATION

Mediation of contested custody/visitation matters prior to being assigned to trial, offers a non-adversarial forum for parents to resolve contested custody and visitation disputes and is required in all cases. Referral to Conciliation Court should involve all significant members of the immediate and extended family so that a cooperative agreement may be achieved in the best interests of the child.

When a family is not able to reach a mediated settlement, other services may be required to settle the dispute, i.e., a custody investigation report and/or a psychiatric evaluation.

In deciding which of the two types of reports are to be used to determine the outcome of a contested custody case, the following descriptive considerations may be of help.

CHILD CUSTODY PSYCHIATRIC EVALUATION: A Child Custody Psychiatric Evaluation is indicated when one or both parties allege emotional illness, either on the part of the child or one or both of the parents, and expert evaluation by a psychiatrist of all the principal parties would provide the court with information that would be helpful in resolving the case "in the best interests of the child."

CHILD CUSTODY INVESTIGATION REPORT: A Child custody Investigation Report is indicated when, in a contested case, the allegations are environmental and sociological in nature. This field study provides for the assessment of living conditions, presence or interference by third parties preventing the child's access to either parent, and an assessment of the overall family system in which the child is involved. It also provides for the summarization of the child's school performance and a summary of the child's medical history, if this is pertinent to the case. Observations and information can also be gathered from relatives, friends, neighbors, etc., who are in a position to provide direct observations of the events alleged not to be "in the best interests of the child."

Listed below are resources available to attorneys who may be considering the use of either a Court Investigator's Report and/or a Child Custody Psychiatric Evaluation.

I. Child Custody Investigations

1. Los Angeles Superior Court - Dept. 2
   111 North Hill Street, Room 238
   Los Angeles CA 90012

   Contact for
   general information: Mrs. Karen Reiford, Director
   (213) 974-5544

2. Los Angeles County Probation Department
320 West Temple Street, Room 180
Los Angeles, CA 90012

<ins>Contact for</ins>
general information: Mr. Terry Tooley
(213) 974-9029

II. <ins>Child Custody Psychiatric Evaluations</ins>

1. Los Angeles Superior Court
111 North Hill Street, Room 211
Los Angeles, CA 90012

<ins>Contact for</ins>
general information: Gary Chase, M.D.
(213) 974-5566

2. Center for Legal Psychiatry
2424 Wilshire Boulevard
Santa Monica, CA 90403

<ins>Contact for</ins>
general information: John Suarez, M.D.
(213) 829-9764

3. Institute for Law & Psychiatry
USC - Psychiatric Hospital
1934 Hospital Place
Los Angeles, CA 90033

<ins>Contact for</ins>
general information: Seymour Pollack, M.D.
(213) 226-4942

4. Cedars Sinai Hospital
Thalians Clinic - Creative Custody Program
8730 Alden Drive, Room E 238
Los Angeles, CA 90048

<ins>Contact for</ins>
general information: Frank Williams, M.D.
(213) 855-3561

ATTACHMENT C — Continued

MANDATORY CONCILIATION CUSTODY/VISITATION MATTERS: California's Bold Stroke.

Hugh McIsaac*

On March 27, 1980, Governor Edmund G. Brown, Jr. signed into law, S.B. 961 by Senator Alan Sieroty. This legislation reformed California's Family Conciliation Courts and made mediation mandatory in all contested custody and visitation matters before a party has any entitlement to a court hearing. In addition, this law enabled conciliation courts to be self-supporting through permitted increases in the divorce filing and marriage license fees. This article describes some of the history of the legislation and a summary of the bill.

Dramatic increases in the divorce rate in California from an average of 3.6 divorces per thousand population in 1953 to over 6.2 divorces per thousand in 1978 underscored the need for conciliation and the need to resolve custody and visitation disputes (6). Authors such as Romen, Elkin, Weiss and Ricci (3, 4, 17 & 13) among others, began to document the effects of divorce and the need for new institutional means of handling the reorganization of the family transiting the experience of divorce. The realization that divorce was in the spousal role, and not necessarily in the parental role, led to the recognition of the need for a forum permitting both parents to be involved in the continuing care and control of their children, even though they were no longer living together as husband and wife. The need for this forum was further underscored by the passage of California's joint custody statute. Furthermore, the inadequacy of the adversarial system in resolving this conflict only became more apparent as families, the consumers of service, and the courts themselves began to advocate change (1, 2, 5, 7, 8, 9, 15).

In 1973 in Los Angeles, and almost simultaneously in Hennepin County in Minnesota, and Santa Clara County in California, and Dane County Wisconsin, the judiciary began experimenting with the referral of highly contested custody and visitation matters to Conciliation Court, in order for the parents to work out their own agreements (11, 17). Referrals were made in those cases where the litigants were using the Court as a means of getting back at each other and were raising "pseudo-legal" issues, often motivated more by need for revenge, than out of a true concern about the custodial arrangements. The conciliation courts were successful in resolving these disputes. In 1976 in Los Angeles, and in San Francisco, the courts began referring all contested custody and visitation matters to the Conciliation Court prior to trial. This policy was implemented by Judge Donald B. King in San Francisco and Judge Christian E. Markey in Los Angeles (9). At about the same time other counties in California, including Sacramento, San Diego, and Fresno, began referring all contested cases to the Conciliation Court prior to trial. Conciliation courts were successful in approximately 55 to 85% in resolving these conflicts without going to trial. The success of these programs in the large urban areas was one of the major bases for the development of the Sieroty Bill, S.B. 961.

Prior to the passage of S.B. 961, in 1975 the Chel Bill (A.B. 3627) was passed permitting an increase in the divorce filing fee of $5.00 and an increase in the marriage license fee of $2.00 and $2.00 for the marriage certificate, provided that the County match from other funds. This bill was passed as a result of a revenue short fall in Los Angeles County which had led to almost phasing out the conciliation program and a 50% reduction in staff. With the advent of escalating home values, and consequent rapid increase in local property taxes, extreme pressure was being placed on local jurisdictions to find additional means of support, or to cut services. Los Angeles Conciliation Court was cut in half during this period. While the Chel Bill met the immediate problem of funding the Conciliation Court on a temporary basis, the program was still in jeopardy, because it did not make the service mandatory and still required County funds (10). In 1977 a bill was sponsored by Senator Dunlap (S.B. 427), which would have provided sufficient revenue for all California courts, but because of the opposition of the California Rural Legal Assistance and other legal aids throughout the state, the bill was limited only to Napa and Shasta Counties which permitted an increase of $45.00 in the divorce filing fee in those jurisdictions. The Legal Aid Foundation objected to the legislation because they felt it was regressive, and because of the lack of uniform application of the *in forma pauperis* provisions worked against clients represented by legal aid.

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*Hugh McIsaac, M.S.W., is Director of Family Counseling Services, Los Angeles Conciliation Court, Superior Court, Los Angeles County, California.

In 1978 a commission was appointed by the state legislature to study the effects of California's no-fault divorce law and to make recommendations for legislation should the need be perceived. The Family Law Advisory Committee, under the direction of Judge Robert Feiner and including Judge Billy G. Mills, Los Angeles County Superior Court, was convened. Steven Belzer was appointed its counsel. A number of very substantial changes were recommended by the Family Law Advisory Committee, among which was a complete revision of the Conciliation Court law, (Code of Civil Procedure, section 1730 through 1772). The initial recommendations of the Advisory Committee was to require mandatory counseling for all families going through the process of divorce. This was not the first time that this recommendation has been made. The objections to the mandatory counseling provisions were made by conciliation courts themselves, out of the recognition that this would require an enormous increase in staff, and for the most part, in other jurisdictions where conciliation had been made mandatory, resulted in merely a bureaucratic, prefunctory process. A very low percentage of couples reconciled contravening the original goal of the legislation which was authored as a pallative to those opposed to the passage of no-fault divorce. The California Chapter of the Association of Family and Conciliation Courts met to review the recommendations of the Family Law Advisory Committee. After a thorough study, the Chapter recommended that mandatory mediation, or conciliation, of contested custody and visitation matters be extended to all counties throughout the state, since this process had proved effective in those counties where these provisions were mandatory. The Association of Family and Conciliation Courts, California Chapter, also recognized this service would be the most logical to make mandatory and easiest to obtain through legislation.

A thorough study of the existing conciliation courts was made by the staff of the Senate Subcommittee on Administration of Justice and a report issued by Steven Belzer. This report became the basis for the introduction of S.B. 961 which was introduced first as an emergency legislation in 1978, just prior to the passage of Proposition 13. S.B. 961 by Senator Sieroty was amended to incorporate the suggestions made by the Senate Subcommittee report, which changed the name to the Family Conciliation Court Act, enlarged the powers of the Conciliation Court to incorporate the possibility of both evaluation and mediation services and made mediation mandatory in all contested custody and visitation matters.

Originally the legislation seperated the evaluation and mediation function, not permitting the mediator to make a recommendation to the Court when the mediation efforts did not result in an agreement of the parties. This clause was changed to permit the introduction of recommendations "according to local rule". Because of the objections of those counties who were already combining the two functions, this compromise was reached to obtain support of all counties within California. Presently Los Angeles and Santa Clara counties do not make recommendations to the trial court.

In addition, the legislation permitted an increase in the divorce filing fee of $15.00, and marriage license fee of $5.00, and an assessing of a $15.00 fee for any motion to modify or enforce a custody and visitation order, all of which were earmarked for support of the Conciliation Court with the County required to provide all indirect, overhead costs from separate funds. The legislation also permitted contracting between smaller counties to set up a service when the number of contested cases would not justify a full-time counselor.

Obtaining passage of the Sieroty Bill was significantly assisted by Steven Belzer, counsel to the Subcommittee on Administration of Justice. Belzer was able to work out an understanding with the Legal Aid faction which would have incorporated language in S.B. 961 that would have liberalized the *in forma pauperis* statute and enable the Judicial Council to establish statewide, uniform guidelines. This section of S.B. 961 became unnecessary when Legal Aid was able to obtain passage of their own legislation which achieved this objective. This compromise was important because it removed the major opposition to S.B. 961 and illustrates the principle in obtaining the passage of legislation, i.e. work with your opposition to determine what changes might satisfy them, or what legislation you could support in return for their support of yours.

The bill was passed very quickly by the Senate Judiciary Committee. However, the chairman of the Assembly Judiciary Committee was concerned about the legislation and held the bill in committee through the summer of 1979, making it a two-year bill. In January 1980, the bill was up for reconsideration, the understanding was that because of the objection of the chairman of the Assembly Judiciary Committee, it was not going to be reported out, and a full-scale effort was mounted in order to show widespread support of the bill. Letters from United Way and family service agencies, Parents Without Partners groups, the Father's Rights groups, the League of Women Voters were obtained. Statewide endorsements were obtained from the PTA and various legal aid foundations. According to a consultant for the Assembly Judiciary Committee, S.B. 961 received more letters of support than any other piece of legislation handled by that committee that year. However, the vital factor in obtaining the reporting of the bill out of the committee may have been the rumor that the Governor was planning to veto the legislation on the basis that the legislation might be viewed as an increase in taxes. The chairman may have felt, "Let Governor Brown take the heat".

A delegation of judges from northern and southern California, Judge Billy G. Mills and Judge Donald B. King, two directors of conciliation courts, including this author, a consumer of the service, and Steven Belzer, who joined the delegation even though he was currently on another assignment, but because of his belief in this legislation wanted to work toward obtaining this passage, met with Alan Sumner, Assistant Legal Affairs Secretary to Governor Brown's staff responsible for making recommendations concerning legislation and legal affairs. The initial position of the Governor's staff was that while the Governor supported the concept of mediation and alternative methods of dispute resolution, the increase in filing fees would not be acceptable because the Governor felt that since Legal Aid had abandoned its role in protecting the poor, the Governor's role was to assume this responsibility. The most persuasive argument for the legislation was mounted by the consumer of the service, who pointed out that this legal battle for custody had cost him and his former wife $38,000 in attorney's fees, and he had been scheduled for a trial which would have cost an additional $8,000 in attorney's fees, plus the cost of $5,000 in trial costs. He also pointed out that this matter had been resolved in the Conciliation Court in a period of 9 to 10 hours, at no cost to himself, and a minimal cost to the County of Los Angeles; he felt "A $15.00 fee increase in a divorce filing fee and $5.00 more to get married, were minimal costs compared to the potential risk that his experience demonstrated would confront couples if this service did not exist. This argument was persuasive; at the end of the conference the representative of the Governor's office said that he, . . . "did not think that he should recommend a veto of this legislation". On March 27, 1980, the bill was signed, ending a three-year struggle.

Important principles demonstrated in obtaining the legislation were (1) Develop a large broad-based coalition of support beginning with the court, (2) Work with the opposition in order to meet their concerns, or find alternative solutions for helping them with legislation that would be in their interest, i.e. assume no one is an opponent until proven otherwise. (3) Do not waste efforts, but concentrate on the legislative task at hand to contact with the legislators involved in the committee currently considering the bill. (4) Concentrate your forces at the point of attack. Contact and educate the legislators before any major vote, and do not take anything for granted. (5) Remember, always dealing in the political arena is best described by Juan Peron in "Evita" as "the art of the possible."

Finally the rationale for the legislation must be clearly thought out and be persuasive. The rationale for the Conciliation Court legislation included the following points: (1) The use of conciliation in settling custody and visitation disputes encourages family self-determination, or "private ordering", which takes government out of the lives of families and helps them to develop their own skills in negotiating conflict in the future. (2) The conciliation model involves all interested parties in the dispute and its resolution permitting, because of its more flexible forum, involvement with grandparents, stepmothers, and others who may have interest in the life of the child. (3) The use of a conciliation forum removes the parental role from the adversary process through which the legal divorce is accomplished. (4) The conciliation process focuses on the future and establishes principles of future behavior rather than trying to assess blame by focusing on past conduct. (5) Conciliation promotes coordination between the Court, the attorneys, and the family. The Court process is best suited to divide property and to assess support, which are decisions made in the legal divorce. (6) Conciliation model is more cost-effective. The most persuasive argument in favor of S.B. 961 was that the conciliation model is only one-fourth the cost of the trial process (See Attachment I). (7). The interposition of a conciliation requirement before families go to trial, encourages settlement, and as Robert Mnookin points out in his brilliant article, "Bargaining in the Shadows of the Law: Case of Divorce in the Courts"; the importance of the laws are not necessarily the law itself, but its effect upon private negotiations of all parties in the "shadow of the law" (12).

The passage of S.B. 961 (Attachment II) is an example of a law that is conceptually sound, involved negotiation and compromise between the existing programs, and met most of the requirements of being a more progressive way to achieve an end, as well as being more cost-effective. Having obtained the legislation, we in California learned, as we had guessed anyway, this is merely the first, and perhaps the easiest step. The next step is to implement the legislation.

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Attachment I

COMPARATIVE COST - 1979
CONCILIATION VS. TRIAL COURT
CUSTODY AND VISITATION MEDIATION
LOS ANGELES COUNTY

I. CUSTODY & VISITATION MEDIATION

A. Conciliation Cost

$\frac{\$2385.18 \text{ p/mo.}}{176 \text{ hr./mo.}} = 13.55$ /hr. — $13.55

Fringe Benefits	25.6% x 13.55	=	3.47
Overhead Cost	41.6% x 13.55	=	5.64
			$22.66 p/hr.

B. Trial Court Cost

$3,839.53	Commissioner
2,427.00	Court Reporter
1,867.00	Court Clerk
1,919.00	Sheriff II
$10,052.53	

$\frac{10{,}052.53 \text{ p/mo.}}{22} = \$456.93$ p/day — 456.93

Fringe Benefits	25.6% x $456.93	=	116.97
Overhead Cost	41.6% x 456.93	=	190.08
			$763.98

C. Cost Comparison

1. Trial Court

$1{,}041 \times \frac{763.98}{2} =$ $397,651.59

2. Conciliation

$1{,}733 \times 3^{\text{hrs.}} \times 22.56 =$ 117,289.44

Net Savings $280,362.15

II. PREMARITAL CONSENT EVALUATIONS

A. Conciliation

1,492 x 1 hr. x $22.66 = $33,808.72

B. Trial Court

$\frac{\$763.98}{6 \text{ p/day}} \times 1{,}492 =$ 189,976.35

Net Savings Premarital Consent $156,167.63

TOTAL SUMMARY OF SAVINGS - 1979

C&V	=	$280,362.15
PMC	=	156,167.63
		$436,529.78

Attachment II

Senate Bill No. 961

CHAPTER 48

An act to add Section 4607 to the Civil Code, and to amend Section 1731 of, and to repeal and add Article 2 (commencing with Section 1740) and Article 3 (commencing with Section 1760) of Title 11a of Part 3 of, the Code of Civil Procedure, and to amend Section 26840.3 of, and to add Section 26862 to, the Government Code, relating to marriage, and declaring the urgency thereof, to take effect immediately.

[Approved by Governor March 27, 1980. Filed with Secretary of State March 27, 1980.]

LEGISLATIVE COUNSEL'S DIGEST

SB 961, Sieroty. Marriage: conciliation courts.

Existing law requires each superior court to exercise jurisdiction as a conciliation court, and sets forth various provisions for the appointment of personnel to assist the conciliation court in disposing of its business in carrying out its functions, the number, classification, compensation, and duties of such personnel differing according to the population of the county involved. This bill would repeal the law relative to conciliation courts and reenact such law in revised form, changing the name of such law to the Family Conciliation Court Law, deleting the latter provisions, and establishing uniform provisions for the appointment of personnel to assist the family conciliation court in disposing of its business in carrying out its functions, the classification in salaries of such persons to be determined by the board of supervisors involved.

Existing law specifies the duties of a supervising conciliation counselor.

This bill would delete such provisions and specify the minimum qualifications for a supervising counselor of conciliation or associate counselor of conciliation.

Existing law authorizes the destruction of specified records by a counselor of conciliation upon order of the judge of the conciliation court.

This bill would authorize such destruction only by the supervising counselor of conciliation.

Existing law does not provide for agreements between counties to provide joint conciliation court services.

This bill would so provide.

Existing law does not specify that the jurisdiction of a conciliation court with respect to controversies arising out of an instance of domestic violence are not exclusive.

This bill would so provide.

Existing law does not grant jurisdiction to the conciliation courts of controversies relating to child custody or visitation regardless of the parents' marital status.

This bill would grant such jurisdiction.

Existing law does not require mediation of an application for modification of an order for child custody or visitation rights.

This bill would so require, operative January 1, 1981.

Existing law provides for various filing and other fees for the support of the conciliation court.

This bill would revise such provisions.

Under existing law, Sections 2231 and 2234 of the Revenue and Taxation Code require the state to reimburse local agencies and school districts for certain costs mandated by the state. Other provisions require the Department of Finance to review statutes disclaiming these costs and provide, in certain cases, for making claims to the State Board of Control for reimbursement.

This bill provides that no appropriation is made by this act pursuant to Section 2231 or 2234 for a specified reason, but recognizes that local agencies and school districts may pursue their other available remedies to seek reimbursement for these costs.

This bill would take effect immediately as an urgency statute.

The people of the State of California do enact as follows:

SECTION 1. Section 1731 of the Code of Civil Procedure is amended to read:

1731. This chapter may be cited as the Family Conciliation Court Law.

SEC. 1.5. Article 2 (commencing with Section 1740) of Title 11a of Part 3 of the Code of Civil Procedure is repealed.

SEC. 2. Article 2 (commencing with Section 1740) is added to Title 11a of Part 3 of the Code of Civil Procedure, to read:

Article 2. Family Conciliation Courts

1740. Each superior court shall exercise the jurisdiction conferred by this chapter, and while sitting in the exercise of such jurisdiction shall be known and referred to as the "family conciliation court."

1741. In counties having more than one judge of the superior court, the presiding judge of such court shall annually, in the month of January, designate at least one judge to hear all cases under this chapter. The judge or judges so designated shall hold as many sessions of the family conciliation court in each week as are necessary for the prompt disposition of the business before the court.

1742. The judge of the family conciliation court may transfer any case before the family conciliation court pursuant to this chapter to the department of the presiding judge of the superior court for assignment for trial or other proceedings by another judge of the court, whenever in the opinion of the judge of the family conciliation court such transfer is necessary to expedite the business of the family conciliation court or to insure the prompt consideration of the case. When any case is so transferred, the judge to whom it is transferred shall act as the judge of the family conciliation court in the matter.

1743. The presiding judge of the superior court may appoint a judge of the superior court other than the judge of the family conciliation court to act as judge of the family conciliation court during any period when the judge of the family conciliation court is on vacation, absent, or for any reason unable to perform his duties. Any judge so appointed shall have all of the powers and authority of a judge of the family conciliation court in cases under this chapter.

1744. In each county in which a family conciliation court is established, or in which counties have by contract established joint family conciliation court services, the superior court, or the superior courts in contracting counties jointly may appoint one supervising counselor of conciliation and one secretary to assist the family conciliation court in disposing of its business and carrying out its functions.

The supervising counselor of conciliation so appointed shall have the power to:

(a) Hold conciliation conferences with parties to, and hearings in proceedings under this chapter, and make recommendations concerning such proceedings to the judge of the family conciliation court.

(b) Provide such supervision in connection with the exercise of his jurisdiction as the judge of the family conciliation court may direct.

(c) Cause such reports to be made, such statistics to be compiled and such records to be kept as the judge of the family conciliation court may direct.

(d) Hold such hearings in all family conciliation court cases as may be required by the judge of the family conciliation court, and make such investigations as may be required by the court to carry out the intent of this chapter.

(e) Make recommendations relating to prompt marriages.

(f) Make investigations, reports and recommendations as provided in Section 281 of the Welfare and Institutions Code under the authority provided the probation officer in such code.

(g) Act as domestic relations cases investigator.

(h) Conduct mediation of child custody and visitation disputes.

The superior court, or contracting superior courts, may also appoint, with the the consent of the board of supervisors, such associate counselors of conciliation and other office assistants as may be necessary to assist the family conciliation court in disposing of its business. Such associate counselors shall carry out their duties under the supervision of the supervising counselor of conciliation and shall have the powers of the supervising counselor of conciliation. Office assistants shall work under the supervision and direction of the supervising counselor of conciliation.

The classification and salaries of persons appointed under this section shall be determined by the board of supervisors of the county which by contract has the responsibility to administer funds of the joint family conciliation court service, or by the board of supervisors of the county in which a noncontracting family conciliation court operates.

Attachment II

1745. (a) Any person employed as a supervising counselor of conciliation or as an associate counselor of conciliation shall have the following minimum qualifications:

(1) A master's degree in psychology, social work, marriage, family and child counseling, or other behavioral science substantially related to marriage and family interpersonal relationships.

(2) At least two years' experience in counseling or psychotherapy, or both, preferably in a setting related to the areas of responsibility of the family conciliation court and with the ethnic population to be served.

(3) Knowledge of the court system of California and the procedures used in family law cases.

(4) Knowledge of other resources in the community to which clients can be referred for assistance.

(5) Knowledge of adult psychopathology and the psychology of families.

(6) Knowledge of child development, clinical issues relating to children, the effects of divorce on children, and child custody research sufficient to enable a counselor to assess the mental health needs of children.

(b) The family conciliation court may substitute additional experience for a portion of the education, or additional education for a portion of the experience, required under subdivision (a).

(c) The provisions of this section shall be met by all counselors of conciliation not later than January 1, 1984, provided that this section shall not apply to any supervising counselor of conciliation who is in office on the effective date of this section.

1746. The probation officer in every county shall give such assistance to the family conciliation court as the court may request to carry out the purposes of this chapter, and to that end the probation officer shall, upon request, make investigations and reports as requested, and in cases pursuant to this chapter, shall exercise all the powers and perform all the duties granted or imposed by the laws of this state relating to probation or to probation officers.

1747. Notwithstanding the provisions of Section 124, all superior court hearings or conferences in proceedings under this chapter shall be held in private and the court shall exclude all persons except the officers of the court, the parties, their counsel and witnesses. Conferences may be held with each party and his counsel separately and in the discretion of the judge, commissioner or counselor conducting the conference or hearing, counsel for one party may be excluded when the adverse party is present. All communications, verbal or written, from parties to the judge, commissioner or counselor in a proceeding under this chapter shall be deemed to be official information within the meaning of Section 1040 of the Evidence Code.

The files of the family conciliation court shall be closed. The petition, supporting affidavit, conciliation agreement and any court order made in the matter may be opened to inspection by any party or his counsel upon the written authority of the judge of the family conciliation court.

1748. Upon order of the judge of the family conciliation court, the supervising counselor of conciliation may destroy any record, paper, or document filed or kept in the office of the supervising counselor of conciliation which is more than two years old, except records of child custody or visitation mediation, which may be destroyed when the minor or minors involved are 18 years of age. In his discretion the judge of the family conciliation court may order the microfilming of any such record, paper, or document.

1749. (a) Any county may contract with any other county or counties to provide joint family conciliation court services.

(b) Any agreement between two or more counties for the operation of a joint family conciliation court service may provide that the treasurer of one participating county shall be the custodian of moneys made available for the purposes of such joint services, and that the treasurer may make payments from such moneys upon audit of the appropriate auditing officer or body of the county for which he is treasurer.

(c) Any agreement between two or more counties for the operation of a joint family conciliation court service may also provide:

(1) For the joint provision or operation of services and facilities or for the provision or operation of services and facilities by one participating county under contract for the other participating counties.

(2) For appointments of members of the staff of the family conciliation court including the supervising counselor.

(3) That, for specified purposes, the members of the staff of the family conciliation court including the supervising counselor, but excluding the judges of the family conciliation court and other court personnel, shall be considered to be employees of one participating county.

(4) For such other matters as are necessary or proper to effectuate the purposes of the Family Conciliation Court Law.

(d) The provisions of this chapter relating to family conciliation court services provided by a single county shall be equally applicable to counties which contract, pursuant to this section, to provide joint family conciliation court services.

SEC. 3. Article 3 (commencing with Section 1760) of Title 11a of Part 3 of the Code of Civil Procedure is repealed.

SEC. 4. Article 3 (commencing with Section 1760) is added to Title 11a of Part 3 of the Code of Civil Procedure, to read:

Article 3. Proceedings for Conciliation

1760. Whenever any controversy exists between spouses, or between parents regardless of their marital status where such controversy relates to child custody or visitation, which may, unless a reconciliation is achieved, result in the dissolution or annulment of the marriage or in the disruption of the household, and there is any minor child of the spouses or parents or of either of them whose welfare might be affected thereby, the family conciliation court shall have jurisdiction over the controversy, and over the parties thereto and all persons having any relation to the controversy as further provided in this chapter.

The family conciliation court shall also have jurisdiction over the controversy, whether or not there is any minor child of the parties or either of them, where such controversy involves domestic violence.

1761. Prior to the filing of any proceeding for determination of custody or visitation rights, dissolution of marriage, legal separation, or judgment of nullity of a voidable marriage, either spouse or parent, or both, may file in the family conciliation court a petition invoking the jurisdiction of the court for the purpose of preserving the marriage by effecting a reconciliation between the parties, or for amicable settlement of the controversy between the spouses or parents, so as to avoid further litigation over the issue involved.

1762. The petition shall be captioned substantially as follows:

In the Superior Court of the State of California
In and for the County of ____

Upon the petition of ____ (Petitioner) And concerning ____ and ____ ____ Respondents	Petition for Conciliation (Under the Family Conciliation Court Law)

To the Family Conciliation Court

1763. The petition shall:

(a) Allege that a controversy exists between the spouses or parents and request the aid of the court to effect a reconciliation or an amicable settlement of the controversy.

(b) State the name and age of each minor child whose welfare may be affected by the controversy.

(c) State the name and address of the petitioner, or the names and addresses of the petitioners.

(d) If the petition is presented by one spouse or parent only, the name of the other spouse or parent as a respondent, and state the address of that spouse or parent.

(e) Name as a respondent any other person who has any relation to the controversy, and state the address of the person, if known to the petitioner.

(f) If the petition arises out of an instance of domestic violence, so state generally and without specific allegations as to the incident.

(g) State such other information as the court may by rule require.

1764. The clerk of the court shall provide, at the expense of the county, blank forms for petitions for filing pursuant to this chapter. The probation officers of the county and the attaches and employees of the family conciliation court shall assist any person in the preparation and presentation of any such petition, when any person requests such assistance. All public officers in each county shall refer to the family conciliation court all petitions and complaints made to them in respect to controversies within the jurisdiction of the family conciliation court. The jurisdiction of the family conciliation court in respect to controversies arising out of an instance of domestic violence shall not be exclusive, but shall be concurrent with any other remedies either civil or criminal in nature that may be available.

1765. No fee shall be charged by any officer for filing the petition.

1766. The court shall fix a reasonable time and place for hearing on the petition, and shall cause such notice of the filing of the petition and of the time and place of the hearing as it deems necessary to be given to the respondents. The court may, when it deems it necessary, issue a citation to any respondent requiring him to appear at the time and place stated in the citation, and may require the attendance of witnesses as in other civil cases.

1767. For the purpose of conducting hearings pursuant to this chapter, the family conciliation court may be convened at any time and place within the county, and the hearing may be had in chambers or otherwise, except that the time and place for hearing shall not be different from the time and place provided by law for the trial of civil actions if any party, prior to the hearing, objects to any different time or place.

1768. The hearing shall be conducted informally as a conference or a series of conferences to effect a reconciliation of the spouses or an amicable adjustment or settlement of the issues in controversy. To facilitate and promote the purposes of this act the court may, with the consent of both parties to the proceeding, recommend or invoke the aid of medical or other specialists or scientific experts, or of the pastor or director of any religious denomination to which the parties may belong. Such aid, however, shall not be at the expense of the court or of the county unless the board of supervisors of the county specifically provides and authorizes such aid.

1769. (a) At or after the hearing, the court may make such orders in respect to the conduct of the spouses or parents and the subject matter of the controversy as the court deems necessary to preserve the marriage or to implement the reconciliation of the spouses, but in no event shall such orders be effective for more than 30 days from the hearing of the petition, unless the parties mutually consent to a continuation of such time.

(b) Any reconciliation agreement between the parties may be reduced to writing and, with the consent of the parties, a court order may be made requiring the parties to comply fully therewith.

(c) During the pendency of any proceeding under this chapter, the superior court may order the husband or wife, or father or mother, as the case may be, to pay any amount that is necessary for the support and maintenance of the wife or husband and for the support, maintenance and education of the minor children, as the case may be. In determining the amount, the superior court may take into consideration the recommendations of a financial referee when such referee is available to the court. An order made pursuant to this subdivision shall not prejudice the rights of the parties or children with respect to any subsequent order which may be made. Any such order may be modified or revoked at any time except as to any amount that may have accrued prior to the date of filing of the notice of motion or order to show cause to modify or revoke.

1770. During a period beginning upon the filing of the petition for conciliation and continuing until 30 days after the hearing of the petition for conciliation, neither spouse shall file any petition for dissolution of marriage, legal separation, or judgment of nullity of a voidable marriage.

If, however, after the expiration of such period, the controversy between the spouses, or the parents, has not been terminated, either spouse may institute proceedings for dissolution of marriage, legal separation, or a judgment of nullity of a voidable marriage, or a proceeding to determine custody or visitation of the minor child or children. The pendency of a proceeding for dissolution of marriage, legal separation, or declaration of nullity, or a proceeding to determine custody or visitation of the minor child or children, shall not operate as a bar to the instituting of proceedings for conciliation under this chapter.

1771. Whenever any petition for dissolution of marriage, legal separation, or declaration of nullity of a voidable marriage is filed in the superior court, and it appears to the court at any time during the pendency of the proceedings that there is any minor child of the spouses, or of either of them, whose welfare may be adversely affected by the dissolution of the marriage or the disruption of the household or a controversy involving child custody, and that there appears to be some reasonable possibility of a reconciliation being effected, the case may be transferred to the family conciliation court for proceedings for reconciliation of the spouses or amicable settlement of issues in controversy in accordance with the provisions of this chapter.

1772. Whenever application is made to the family conciliation court for conciliation proceedings in respect to a controversy between spouses, or a contested proceeding for dissolution of marriage, legal separation, or judgment of nullity of a voidable marriage, but there is no minor child whose welfare may be affected by the results of the controversy, and it appears to the court that reconciliation of the spouses or amicable adjustment of the controversy can probably be achieved, and that the work of the court in cases involving children will not be seriously impeded by acceptance of the case, the court may accept and dispose of the case in the same manner as similar cases involving the welfare of children are disposed of. In the event of such application and acceptance, the court shall have the same jurisdiction over the controversy and the parties thereto or having any relation thereto that it has under this chapter in similar cases involving the welfare of children.

SEC. 5. Section 4607 is added to the Civil Code, to read:

4607. (a) Where it appears on the face of the petition or other application for an order or modification of an order for the custody or visitation of a child or children that either or both such issues are contested, as provided in Section 4600, 4600.5 or 4601, the matter shall be set for mediation of the contested issues prior to or concurrent with the setting of the matter for hearing. The purpose of such mediation proceeding shall be to reduce acrimony which may exist between the parties and to develop an agreement assuring the child or children's close and continuing contact with both parents after the marriage is dissolved. The mediator shall use his or her best efforts to effect a settlement of the custody or visitation dispute.

(b) Each superior court shall make available a mediator. Such mediator may be a member of the professional staff of a family conciliation court, probation department, or mental health services agency, or may be any other person or agency designated by the court. In order to provide mediation services, the court shall not be required to institute a family conciliation court. The mediator shall meet the minimum qualifications required of a counselor of conciliation as provided in Section 1745 of the Code of Civil Procedure.

(c) Mediation proceedings shall be held in private and shall be confidential, and all communications, verbal or written, from the parties to the mediator made in a proceeding pursuant to this section shall be deemed to be official information within the meaning of Section 1040 of the Evidence Code.

(d) The mediator shall have the authority to exclude counsel from participation in the mediation proceedings where, in the discretion of the mediator, exclusion of counsel is deemed by the mediator to be appropriate or necessary. The mediator shall have the duty to assess the needs and interests of the child or children involved in the controversy and shall be entitled to interview the child or children when the mediator deems such interview appropriate or necessary.

(e) The mediator may, consistent with local court rules, render a recommendation to the court as to the custody or visitation of the child or children. The mediator may, in cases where the parties have not reached agreement as a result of the mediation proceeding, recommend to the court that an investigation be conducted pursuant to Section 4602, or that other action be taken to assist the parties to effect a resolution of the controversy prior to any hearing on the issues. The mediator may, in appropriate cases, recommend that mutual restraining orders be issued, pending determination of the controversy, to protect the well-being of the children involved in the controversy. Any agreement reached by the parties as a result of mediation shall be reported to the court and to counsel for the parties by the mediator on the day set for mediation or any time thereafter designated by the court.

(f) The provisions of this section shall become operative on January 1, 1981.

SEC. 6. Section 26840.3 of the Government Code is amended to read:

26840.3. (a) The super· · court in any county may, for the support of the family co··· ·tion court or for conciliation and mediation services provide· ·ursuant to Section 4607 of the Civil Code, upon action of the board of supervisors to provide all space costs and indirect overhead costs from other sources, increase

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(1) The fee for filing a petition, except a joint petition filed pursuant to Section 4551 of the Civil Code, for dissolution of a marriage, legal separation, or nullity of a marriage, and the fee for a response to such a petition, by an amount not to exceed fifteen dollars ($15).

(2) The fee for issuing a marriage license, by an amount not to exceed five dollars ($5).

(3) The fee for issuing a marriage certificate pursuant to Section 4213 of the Civil Code, by an amount not to exceed five dollars ($5).

(b) The funds shall be paid to the county treasury and an amount equal thereto shall be used exclusively to pay the costs of maintaining the family conciliation court or conciliation and mediation services provided pursuant to Section 4607 of the Civil Code.

SEC. 7. Section [illegible] is added to the Government Code, to read:

[illegible]. In any county in which there is a family conciliation court, or in which counties have by contract established joint family conciliation court services, a fee of fifteen dollars ($15) shall be paid to the county clerk at the time of filing a motion, order to show cause, or other proceeding seeking to modify or enforce that portion of any judgment or order entered in this state or any other state which orders or awards the custody of a minor child or children or which specifies the rights of any party to the proceeding to visitation of a minor child or children. The funds shall be paid to the county treasury and shall be used exclusively to pay the costs of maintaining the family conciliation court.

SEC. 8. Notwithstanding Section 2231 or 2234 of the Revenue and Taxation Code, no appropriation is made by this act pursuant to these sections because self-financing authority is provided in this act to cover costs that may be incurred by it in carrying on any program or performing any service required to be carried on or performed by it by this act. It is recognized, however, that a local agency or school district may pursue any remedies to obtain reimbursement available to it under Chapter 3 (commencing with Section 2201) of Part 4 of Division 1 of the Revenue and Taxation Code.

SEC. 9. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting such necessity are:

In order to prevent the discontinuation of family conciliation courts, it is necessary that this act take effect immediately.

ESTIMATING CASELOAD AND PERSONNEL REQUIREMENTS IN COURT RELATED CONCILIATION PROGRAMS

O. J. Coogler*

Court systems are now considering alternatives to the adversarial process in many areas, especially in connection with controversies between marriage partners, parents, and children. One example of this trend is the establishment of the Family Conciliation Unit in the Circuit Court in Fort Lauderdale, (Broward County) Florida. While legislation authorizing conciliation services was awaiting passage in the Florida Legislature, the Circuit Court recommended and received the support of the County Commissioners for a program to begin operating. This paper describes how the program was begun and the recommendations that have been made for its further development.

A study of court-related conciliation programs reveals a varied pattern of services. Listed below are the services provided in these programs. Services in **BOLD FACE** are those most commonly provided. Services in Regular Type have been added to many court services during the last two to three years. Services in *Italics* are offered in only a few courts.

PRE DIVORCE SERVICES:

MARRIAGE AND FAMILY COUNSELING
SEPARATION COUNSELING
CUSTODY/VISITATION COUNSELING
CUSTODY/VISITATION EVALUATION
WITH RECOMMENDATION
TO COURT
Mediation of Custody/Visitation
Mediation of Spousal and Child Support
Mediation of Property Division
Pre-marital Counseling for Under Age 19

POST DIVORCE SERVICES:

CUSTODY/VISITATION COUNSELING
CUSTODY/VISITATION EVALUATION
WITH RECOMMENDATION
TO COURT
Mediation of Custody/Visitation Modification
Mediation of Spousal and Child Support Modification

Under the Administrative Order creating the Family Conciliation Unit in Fort Lauderdale (Appendix A) all of the above listed services were to be provided except:

CUSTODY/VISITATION EVALUATION
WITH RECOMMENDATION
TO COURT
Pre-marital Counseling for Under Age 19

Beginning with the second year of our program we have recommended that *CUSTODY/VISITATION EVALUATION* be added.

Our first year staff consided of a Director, Counselor, and Secretary plus two inexperienced clerical workers under the CETA and BETA programs. The program was funded by adding a three dollar ($3.00) charge to all civil cases filed in the Circuit Court which was supplimented from general county revenues. According to our experience and the procedures described later, this staffing can handle an inflow of 22 cases per month. The remainder of this paper will deal with estimating caseload and personnel requirements for the second year of our program.

Our first step was to make an analysis of how counselors spend each working day to determine how much time they can schedule to spend with clients. This time we define as "Scheduled Client Contact Hours." In addition to these hours, counselors must have available some non-scheduled time and must attend to administrative duties such as writing casenotes, Memorandums of Agreement reached by clients, case consultation with supervisors, and the like. Also counselors need space between clients so as to adjust their thinking to the situation the next couple will present and for reviewing casenotes from the previous interview. The following analysis takes into account that there will be late cancellations and missed scheduled appointments which allows added time for non-scheduled work and administrative duties.

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THE COUNSELOR'S WORK DAY

	Hours	Percent
Scheduled Client Contact Hours	4½	56.25
Non-scheduled Client Contact Hours	1	12.50
Administrative Hours	2	25.00
Time Adjustment*	½	6.25
TOTALS	8	100.00

*Office hours are actually 7½ rather than 8 hour days.

Our next step was to determine the counselor's annual number of available working hours as follows:

THE COUNSELOR'S ANNUAL WORKING HOURS

40 hours × 52 weeks	2,080
Less vacation; 40 hours × 2	(80)
Less holidays; 8 hours × 7	(56)
Less sick leave; 40 hours × 2	(80)
NET WORKING HOURS	1,864

Now considering how the counselor spends each working day we can calculate the annual number of Scheduled Client Contact Hours per counselor, thus:

THE COUNSELOR'S ANNUAL SCHEDULED CLIENT CONTACT HOURS

56.25% of working time × 1,864 net working hours = 1,048 hours

Our experience and study of other court services indicates that an average of about six (6) Scheduled Client Contact hours is required for each case handled. Thus:

THE COUNSELOR'S ANNUAL CASELOAD

1,048 Scheduled Client Contact hours ÷ 6 = 175 cases

Using the foregoing analysis of the counselor's annual caseload capability and a projection of annual caseload as explained below we developed a proposal for our second year program staff and compared it with two other court systems offering similar conciliation services. In selecting court systems for comparisons, we chose a similar demographic area to Broward County in another state in counties that bracketed our populations. Table 1, next page shows this comparison.

In order to predict an annual caseload it is necessary to begin with an existing statistic that indicates the level of marital and family disruption in a community. We concluded that the annual number of divorce filings in the county is such an indicator. Then we compared the actual caseload in the two court services shown in Table 1 and in a number of other courts with the annual number of divorce filings. Expressing this comparison as a percentage of conciliation service caseload to the annual number of divorce filings we found that range is from 10% to 18%.

In Table 1 we have selected 12% of the 8,000 divorce filings in this county to indicate the caseload we expect to attain during the second year of our operations. Thus, we predict an annual caseload of 960, or a monthly inflow of 80 cases. In support of the validity of this prediction, we found that during the last four of the first six months of our operations we had attained a monthly inflow rate of 36 cases, representing 45% of our predicted annual rate. As this represents an overload upon our present staff capability, we must limit our intake of cases until additional staff and funding is available. However, it seems apparent from this rate of use of our services, that given availability of staff we would easily attain, if not exceed, our predicted figure.

In order for the professional staff of a conciliation service to function effectively, an administrative staff must be provided. In terms of total number of personnel in the professional staff compared to the total administrative staff, we found that the administrative staff approximates 50% of the professional staff. Table 1, on the following page, illustrates this comparison. We have not included in this calculation inexperienced clerical assistance provided by CETA and BETA personnel. Considering the permanent staff time required for their training and supervision, as well as the turnover in personnel, there is very limited, if any, net gain in productive administrative work from their employment in a conciliation service.

Our next task was to demonstrate appropriate salary levels for our staff. Table 2, (Appendix B) shows a comparison of our proposed salary levels and the other two court systems we studied.

Table 2 shows an index of "Personnel Costs Per Case" using the total of basic salary levels of professional and administrative personnel divided by the annual caseload. Because of the many variable factors regarding the services

TABLE 1

GENERAL STATISTICAL COMPARISONS - PERSONNEL - WORKLOAD

ITEMS	COUNTY "A"	COUNTY "B"	Broward Projection	Broward 4/1/80
County population served	1,500,000	520,000	1,000,000	1,000,000
Annual divorce filings	14,000	4,400	8,000	8,000
Divorce filings per 1,000 population	9.33	9.27	8.00	8.00
Annual number of referrals	2,611	600	960	264*
Percentage of referrals to filings	18.65	13.64	12.00	3.30
Director	1	1	1	1
Senior Counselors	2	1	1	0
Counselors	14	2	4	1
TOTAL professionals	17	4	6	2
Administrative Assistant	1	0	0	0
Court Secretary III	6	1	2	1
Clerk Typist - Receptionist	2	1	1	0
TOTAL administrative	9	2	3	1
Ration (%) of Administrative to Professional staff	53%	50%	50%	50%
Client contact hours provided Number counselors x 1,048 **	17,292	3,668	5,764	1,572
Average hours per referral	6.62	6.11	6.00	5.95

*Average referrals annualized (22 x 12 = 264)
**Includes Director at ½ caseload

provided, this index cannot be regarded as a measure of cost effectiveness, but rather to indicate the level of investment in conciliation services that a county is making as compared to other systems.

It is appropriate that Broward County's personnel cost per case index should be lower than in the other two court systems, both of which have been operating for ten years or longer. Their personnel have attained annual increases over their years of service, while all of our personnel will be recently employed. County planners should take into account this cost increase over time as well as the quantity and quality of services provided when comparing this index with other systems.

As it is important that budget committees be able to quickly grasp how a conciliation services operates, we prepared a flow chart to graphically demonstrate this (Appendix C). In our flow chart, beginning and ending points are shown as ovals, decision points are diamonds, and process points are rectangles. Finally, the usual organizational chart will also be helpful. Our proposed organizational chart is attached (Appendix D).

In explaining conciliation services to budget committies, it is important to counteract their tendency to regard such services as just another social service providing counseling. That conciliation services are "worthwhile" and have humane goals is not likely to carry much weight in todays "Proposition 13" political climate. In fact, too much emphasis upon such considerations may even prove to be counterproductive. (A sad commentary upon our times.) The most effective presentation is likely to be a focus upon the favorable costs effectiveness of conciliation services as compared to tradtional court services. The failure to provide conciliation services does not avoid a tax burden. The effect is to transfer the cost of dealing with marital and family disruption to the court system at a higher per case cost to the taxpayer. *Providing conciliation services transfers the cost from the court system to a more cost effective process and results in a reduction of the taxpayer's burden.* If they can understand this, THEN they may be more attentive to humane goals such as preserving the family and meeting children's needs in a troubled world.

Demonstrating the cost effectiveness of conciliation services as compared to traditional court services is an art that greatly needs further development. Most efforts so far have been based upon the general data that is available in most court systems supported by the opinions of experienced court officials. If conciliation services are to attain their proper role in our court system, and if our society is to reap this benefit, then empirical research must be conducted. Meanwhile, the proposition that conciliation services are cost effective is best supported by well informed attorneys, judges, and other court officials who can give case examples and possibly other data.

It is not the aim of this paper to address the funding methods employed to support conciliation services in the various court systems. An exploration of this topic is under consideration as the basis for another paper, but for now it may be said that the range is from total support, derived from general revenues, to almost total support derived from additional fees charged upon civil case filings and marriage licenses issued. Exemplary conciliation services may be found at both extremes of these funding methods.

At this time it is more likely that a new conciliation service will be funded by additional charges upon case filings than from general county revenues. In most states filing fees are fixed by state law, but in some states county authorities are authorized to add to these fees a surcharge to be used for the "improvement" of court services. Conciliation services can be said to improve court services by reducing the caseload upon an overburdened court, as well as being more cost effective. If you find that your country authorities can assess such a surcharge, then you need not wait until you have a legislative act to begin a conciliation service. Read your local state laws and look for "creative" interpretations.

If you find that a surcharge can be made by your county authorities, then the possibilities are:

1. Add an amount to all civil cases filed.
2. Add an amount to all responses filed.
3. Same as 1 and 2 above but limited to divorce filings.
4. Charge for post-divorce modification applications.

We know of no state in which additional charges may be made upon marriage licenses, except by legislative authorization. Naturally all of the above listed surcharges may also be authorized by the legislature.

The amount of the surcharge or combinations of more than one can be determined from court records of case, response, and modification filings in relationship to the budget needed from this source.

The author will welcome comments from readers, especially with suggestions and experiences you have had in addressing the problems covered in this paper.

APPENDIX A

IN THE CIRCUIT COURT OF THE SEVENTEENTH
JUDICIAL CIRCUIT, IN AND FOR BROWARD
COUNTY, FLORIDA

ADMINISTRATIVE ORDER NO. 79-25

IN RE: :

FAMILY CONCILIATION UNIT :

______________________________ :

Pursuant to a majority vote of the Circuit Judges of the Seventeenth Judicial Circuit on October 13, 1978, approving the concept of a marriage conciliation program, and by virtue of the Ordinance passed by the Broward County Board of County Commissioners on March 20, 1979, determining and declaring the funding and establishment of such a program to be a county purpose, the Family Conciliation Unit of the Seventeenth Judicial Circuit is hereby established as an adjunct service of the courts.

I. PURPOSE

A. The Family Conciliation Unit shall have as its primary functions:

1. The mediation of marital and divorce conflicts.
2. The prevention of needless marriage dissolutions where possible, and if not possible, the reduction of the negative effects and after effects of divorce on husbands, wives, and children.

B. The conciliation procedure is not designed to effectuate delay in legitimate proceedings before the Court or to require parties to participate in the mediation process where no useful purpose can be served; nor is the service designed to force the continuance of a marital relationship against the desires of either spouse; nor is the Family Conciliation Unit authorized to conduct, prepare, or submit evaluations.

The process is designed for the benefit of the parties and their counsel, to present an alternative to the traditional adversary system, and to assist in the mediation of contested issues and the amicable settlement thereof. The service is further designed to assist parents who are ending their marital relationship in preserving their roles as parents and to prevent unnecessary disruption in the lives of their children. The Family Conciliation Unit shall always operate with these principles as primary responsibilities.

II. AUTHORITY

Whenever any controversy exists between persons in a relationship which may, unless a reconciliation is achieved, result in legal separation, dissolution or annulment of the marriage or in the disruption

APPENDIX A (continued)

of the household, and there is a minor child of both or either of them whose welfare might be affected thereby, the Family Conciliation Unit shall, upon proper petition or referral by the Court as provided below, have the authority to consult and conduct conferences with the parties thereto and all persons having any relation to the controversy, to make use of appropriate resources, to prepare and submit reports to the Court, and to do all other such things as are necessary to fulfill the purposes and responsibilities of the Unit. If there be no minor child, the Family Conciliation Unit may have such authority upon proper petition showing a genuine need for its services, or upon order of the Court. Court ordered conciliation proceedings shall not extend beyond sixty days from the date of the referral.

III. FEES

No fee shall be charged for the filing of the petition nor shall any fee be charged by any officer for the performance of any duty pursuant to this Administrative Order.

IV. PROCEDURES

A. Petition Invoking Authority of Family Conciliation Unit. Prior to the filing of any action for annulment, dissolution of marriage, separate maintenance, support and custody, the parties to a domestic relations controversy may jointly file with the Family Conciliation Unit a petition for conciliation services for the purpose of effecting a reconciliation between the parties so as to avoid further litigation over the issue involved.

1. Petition Contents. The petition shall:

(a) Allege that a controversy exists between the parties and request the aid of the Family Conciliation Unit to effect a reconciliation or an amicable settlement of the controversy.

(b) State the name and address of the parties and the date of their marriage.

(c) State the name and age of each minor child whose welfare may be affected by the controversy.

(d) State the name of any other person who has any relation to the controversy and the address of the person if known.

(e) If no [illegible]r child is involved, show the need for the services of the Unit and the benefits proposed to be derived therefrom.

2. Blank Forms; Assistance in Preparing and Presenting Petition. The Clerk of the Court shall provide for the use of interested parties blank forms for petitions for conciliation services. The employees of the Family Conciliation Unit shall assist any person in the preparation and presentation of any such petition when requested to do so.

B. Referral of Actions by the Court.

Any action for annulment, dissolution of marriage or legal separation in which it appears to the Court that there is a minor child of the parties or either of them whose welfare may be adversely affected thereby, and there appears to be some reasonable possibility of a reconciliation being affected or for amelioration of the effects upon the minor child, may be referred to the Family Conciliation Unit by the Court for proceedings for reconciliation of the parties or amicable settlement of issues in controversy in accordance with the provisions hereof. Such actions in which no minor child is involved may be referred by the Court to the Unit upon a determination that the services thereof may be beneficial to the parties or to the Court.

C. Referral by a General Master.

In any proceeding before a General Master for temporary support, custody, visitation or postjudgment proceedings, the General Master, on his or her own motion or on motion of either party, may recommend to the Court having jurisdiction in the case that the case and parties be referred to the Family Conciliation Unit pursuant to the provisions hereof. If both parties consent, a direct referral to the Family Conciliation Unit may be made by the General Master. Such referral shall not diminish the authority of the Court to enter orders of temporary support.

D. Mediation Conference, Time, Place and Notice.

The Director of the Family Conciliation Unit shall fix a reasonable time and place for a mediation conference on the matters in controversy, said conference to be held within ten days of the filing of the petition or order of referral, unless the parties shall agree to an extension of time or the court for good cause shall extend the time for a period not to exceed thirty days. The Director shall cause notice of the filing of the petition or motion and order of referral, and of the time and place of the Conference to be given to the parties.

E. Conduct of Hearing, Recommendations: Aid of Specialists; Expense; Confidential Communications.

1. The Mediation conference shall be conducted by the Family Conciliation Unit Director, or a Family Conciliation Unit counselor. Further conferences may be held by agreement of the parties or upon order of the Court.

2. In cases which have been referred to the Family Conciliation Unit by court order, the mediator shall upon the completion of the conference, submit a Progress Report thereon to the Director of the Unit who shall review it and report the results of the conference to the referring Judge. Said Judge may order further conferences on request of either party or his own determination of the need therefor.

3. To facilitate and promote the purposes of this Administrative Order, the Unit may, with the consent of both parties, recommend or invoke the aid of appropriate resources, such as physicians, psychologists, social agencies, or other appropriate individuals or agencies. No reports of any such individual or agency available to the Family

APPENDIX A (continued)

Conciliation Unit shall be filed in or become a part of the records of the case. Any such aid shall not be at the expense of the Court or the County.

4. All conferences and other proceedings held pursuant to conciliation authority shall be held in private.

5. All communications, verbal or written, between disputants and from disputants counselors, the court, attorneys, doctors or others engaged in the conciliation proceedings, made in conciliation conferences, hearings, and other proceedings had pursuant to the conciliation authority shall be privileged and confidential.

6. All records of the Family Conciliation Unit with respect to conciliation proceedings in any case shall be closed and sealed. However, any written conciliation or mediation agreement between disputants may be opened to inspection by either party or his/her counsel upon written authorization of the judge to whom the case was assigned.

7. Any mediation agreement between the parties may be reduced to writing, and with the consent of the parties, a court order may be entered requiring the parties to fully comply therewith.

8. The Honorable Frank A. Orlando, Circuit Judge, is hereby designated as Supervising Judge of the Family Conciliation Unit.

DONE and ORDERED at Fort Lauderdale, Florida, this 5 day of October, 1979.

George W Tedder Jr

GEORGE W. TEDDER, JR., Chief Judge

APPENDIX B

TABLE 2

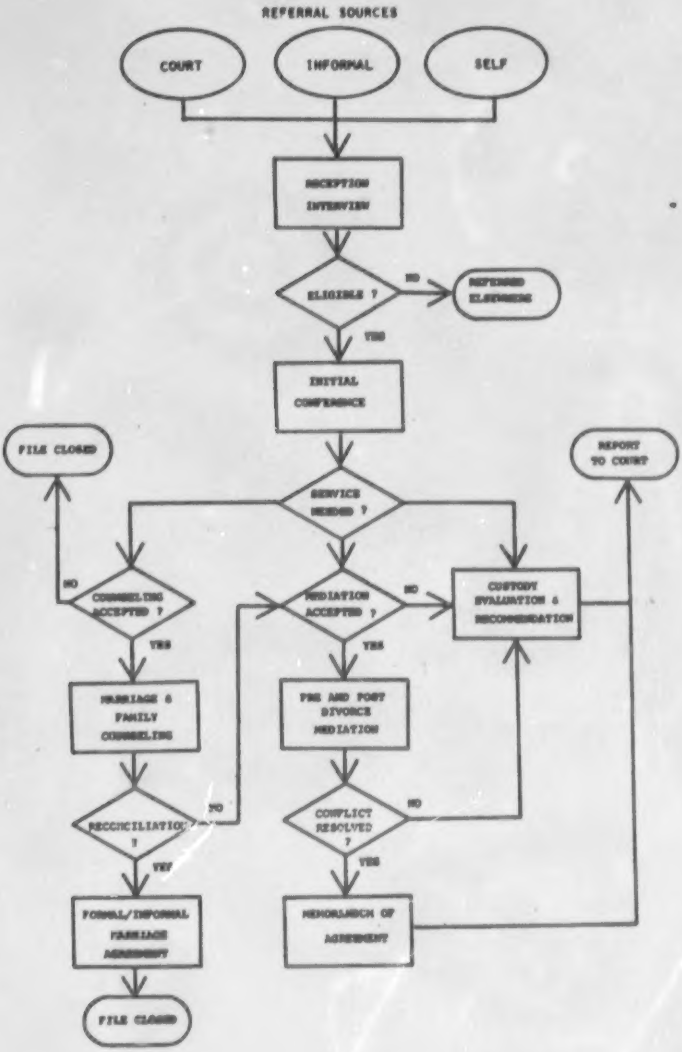
PERSONNEL COST COMPARISON

Position	COUNTY "A"			COUNTY "B"			BROWARD -- PROJECTED		
	No.	Average Salary	Amount	No.	Average Salary	Amount	No.	Salary	Amount
Director	1	29,858	29,858	1	29,000	29,000	1	30,000	30,000
Senior Counselor	2	22,963	45,926	1	20,250	20,250	1	21,500	21,500
Counselor	14	21,871	306,194	2	17,000	34,000	1	20,630	20,630
Counselor	x	x-x-x	x-x-x	x	x-x-x	x-x-x	3	18,600	55,800
Administrative Asst.	1	13,842	13,842	x	x-x-x	x-x-x	x	x-x-x	x-x-x
Court Secretary III	6	11,616	69,696	1	11,616	11,616	1	11,610	11,610
Court Secretary III	x	x-x-x	x-x-x	x	x-x-x	x-x-x	1	9,900	9,900
Clerk Typist	2	10,108	20,216	1	10,108	10,108	1	8,640	8,640
TOTALS	26	x-x-x	485,732	6	x-x-x	104,974	9	x-x-x	158,080
Annual Caseload	2,611	x-x-x	x-x-x	600	x-x-x	x-x-x	960	x-x-x	x-x-x
COST PER CASE	x-x-x	x-x-x	186.03	x-x	x-x-x	174.96	x-x	x-x-x	164.67

APPENDIX C

FAMILY CONCILIATION UNIT

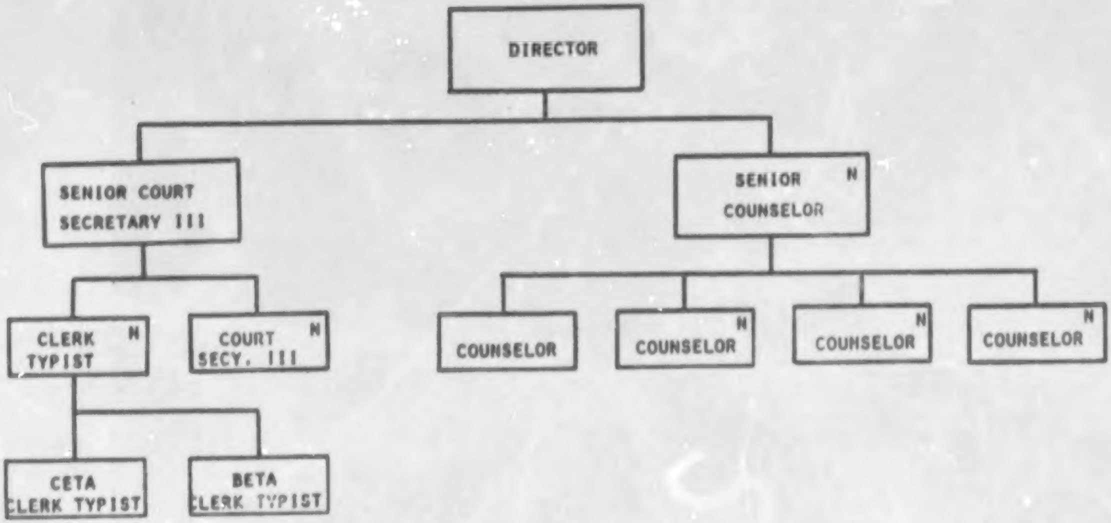
FLOW CHART


REFERRAL SOURCES
COURT
INFORMAL
SELF
RECEPTION INTERVIEW
ELIGIBLE ?
NO
REFERRED ELSEWHERE
YES
INITIAL CONFERENCE
FILE CLOSED
REPORT TO COURT
SERVICE NEEDED ?
NO
COUNSELING ACCEPTED ?
MEDIATION ACCEPTED ?
NO
CUSTODY EVALUATION & RECOMMENDATION
YES
YES
MARRIAGE & FAMILY COUNSELING
PRE AND POST DIVORCE MEDIATION
RECONCILIATION ?
NO
CONFLICT RESOLVED ?
NO
YES
YES
FORMAL/INFORMAL MARRIAGE AGREEMENT
MEMORANDUM OF AGREEMENT
FILE CLOSED

APPENDIX D

FAMILY CONCILIATION UNIT

ORGANIZATIONAL CHART


DIRECTOR
SENIOR COURT SECRETARY III
SENIOR COUNSELOR N
CLERK TYPIST N
COURT SECY. III N
COUNSELOR
COUNSELOR N
COUNSELOR N
COUNSELOR N
CETA CLERK TYPIST
BETA CLERK TYPIST

N = NEW POSITION

HENRY M. ELSON
Counselor and Attorney at Law

SETTING UP A PRIVATE "MEDIATION" PRACTICE

This paper will deal with the origin and development of that part of my law practice which I refer to as "non-adversary family law", also known as "divorce mediation".

Inspiration and Conception

In 1970 I had been practicing law for about 17 years. I was in a three-person partnership that was engaged in the general practice of law in Berkeley, California. Each of the partners leaned towards an emphasis in one or two areas of the law. My clients and the community were coming to associate me with an interest, if not a specialization, in family law. My representation of clients involved in divorce and related family law problems continued to increase in numbers of clients and the complexity and difficulty of the cases. My experience in this field led me to become dissatisfied with the manner in which divorce cases were processed in the adversary system. Many lawyers who felt the same way, consciously or unconsciously, simply eliminated divorce cases from their case-load, usually with a sigh of relief, or continued the practice with a heavy heart. To the extent that one can "enjoy" practicing family law I did, or at least found it more interesting and challenging than other fields, so when "no-fault" divorce became the law in California with the passage of the Family Law Act of

1970 I decided to try to practice family law outside of the adversary system. I was fortunate to be able to take a sabbatical in 1971 and far from the law office and the courtroom I preliminarily and tentatively designed an approach to family law cases which became the basis for that part of my practice I refer to as non-adversary family law.

I have a letter dated July 2, 1971, postmarked Corsica, France, which I wrote to my partners, analyzing the reasons for my planned withdrawal from practicing family law in the adversary system. I also proposed a model for non-adversary family law practice. That model is almost identical to the system I have used since 1972. I have added, as Exhibit "A", excerpts from that letter.

When I returned to my practice I simply told my partners, the bar, and my clients that I was no longer available as a conventional advocate lawyer in family law cases, but would be willing to practice family law on my terms in an effort to assist clients in working out their own agreements. It was my intention to continue the general practice of law with non-adversary family law as an additional way of serving my clients. I have continued to do so since 1972 and these cases now constitute about half of my practice.

Source of Clients

With the exception of a small sentence after my name in the yellow pages for a few years (since discontinued for some reason) my promotional work was by word of mouth among attorneys, psychotherapists, counselors, other professionals and friends. There were occasional talks before interested groups and university classes. Recently there has been a growing number of newspaper and magazine articles which have referred to the process, and from time to time, to me personally. There are now frequent conferences, meetings, training seminars, law review articles, and substantial amounts of media coverage as mediation appears to have gone into its "hula hoop" stage. This publicity has generated some clients, although the major sources continue to be other attorneys, therapists and now former clients.

The referrals from the newspaper and magazine articles are often difficult cases. I think many of these clients have rather unrealistic expectations. They include a disproportionate number of people looking for a "deus ex machina" way out of difficult marriages.

The Essence - A Non-Exclusive Alternative for a Limited Number of Clients

Although I have refined the process over a decade of practice, it is still essentially the same as it was at the inception. I see the process essentially as a non-exclusive alternative to the adversary process. Instinctively I knew that only a limited number of clients would be able to function well in this system. My experience confirms this. How to make this judgment is not so easy to explain. There is some intuition involved. Certainly clients who are in the midst of their "emotional divorce" are not good candidates. Nor are clients with substantial differences in intelligence, competence, or self esteem. If there is more than a normal amount of mistrust or if one party has a particularly rigid personality it is a contra-indication. If the case has only one issue that must be resolved it will present more than the usual amount of difficulty. "Good" clients for the process should be independent, intelligent, flexible, evenly matched, with several children and multiple issues to be resolved. But then such a nice couple will probably stay married.

The emotional pain that almost always accompanies divorce makes it difficult for clients to work together in the business of undoing their relationship. It quickly becomes apparent that this process is no panacea. It is not a substitute for the adversary process; it is simply another way of proceeding for those clients who prefer, for any number of reasons, not to use the adversary system to resolve their family problems.

It never occurred to me to consider the product an "amicable divorce". Personally I don't even think "amicable" is a good way to describe a successful marriage. If an adjective is necessary, I prefer to use the word "cooperative".

While I am pleased and gratified that mediation has become so popular I am also concerned that too much enthusiasm may attract both inappropriate clients and professionals. It seems premature, at best, to be talking about licensing mediators or even to be characterizing mediation as a discrete profession. Perhaps our task would best be limited at this time to the sharing of our experiences and the development of skills and standards for those who are involved in mediation as a part of their existing professional practices.

The Adverse Interest Question

The first business of this kind of legal consultation is to deal carefully with the question of the role of one lawyer with two clients with adverse legal interests. I satisfied myself that in California it was legally permissible for one lawyer to be consulted by clients with adverse legal interests so long as there is a written acknowledgment from both clients that this issue was explained and understood by them. This remains a difficult problem. It must be kept in the open throughout the process.

Neutrality of the Lawyer-Mediator

The only way the lawyer can serve these clients is by maintaining a neutral posture towards them. I emphasize this from the first telephone contact with the client who makes the call by requiring a similar call back from the other client before meeting together. It is not always necessary but it dramatizes the point. At this stage, and later, the clients are informed that if the mediation process breaks down the lawyer will not represent either client in later adversary proceedings.

Usually all my meetings are with both clients although there are exceptions. All exceptions are with both clients' consent.

Written Agreement

The first meeting is followed, if there is to be continued consultation, by a comprehensive letter agreement which must be signed by both parties and the attorney. A copy of that letter agreement is attached, as Exhibit "B". It restates the adverse legal interest point in simple clear language and refers to other limitations of the process in a candid and direct statement wherein the clients are reminded that some of them just cannot handle psychologically a cooperative divorce and indicating that the mediative process does not offer the same protection as its adversary counterpart.

The agreement I use serves at least four purposes. First, it puts the various warnings-caveats in writing, thus reminding the clients of these important considerations and securing their signatures. Second, it sets forth a check list of the general issues to be resolved. Third, it memorializes certain general interim agreements the parties reach at the first session regarding privacy, transfers of property, debts, etc. Fourth, it directs the clients' attention to specific fact questions and legal matters that must be dealt with in the particular case, setting forth any tentative agreements reached or apparent problems that are encountered to date.

Independent Legal Advice

At the first meeting the clients are educated about the meaning of adverse legal interests with examples supplied from experience. Further the importance of securing separate and independent legal consultation is emphasized and encouraged, particularly at the early stage of negotiation.

Essentially the clients are negotiating an agreement with the assistance of the lawyer-mediator. Clients negotiate more effectively when they know "what their rights are" during the negotiations. To wait until the negotiation is completed and then have an independent lawyer review the final agreement may guarantee that the agreement correctly states the terms of the agreement; however, it is a serious problem if the negotiation is reopened because the reviewing lawyer raises new points for the first time. I encourage clients to check out difficult points with independent counsel during the negotiation process as they arise. This can be expensive and many clients choose not to do so. Realistically, lawyers are protecting themselves as well as their clients, when they encourage independent legal consultation. I am impressed by the large number of clients who choose not to get independent legal advice.

Psychologically Unsuitable Clients - Limitations of the Process

The clients are carefully advised that psychologically they, or one of them, may not be good candidates for this process and their particular situation and relationship are examined. They are informed that they will never get the same kind of protection in our work together that would be available from independent legal representation.

Confidentiality

I promise not to reveal what the clients say to me or to each other without mutual written consent. I believe this is an enforceable agreement. I tell the clients that I am not sure if each of them has a right to the other's silence about the subject matter of the sessions, but I ask them as a matter of honor to agree not to reveal such information irrespective of the law's requirements. Only once have I been subpoenaed (to a deposition) and rather than spend the money to resist, the other party did not object to my testifying. In that case there had been only one session with the clients and no agreement had been signed.

Agreement and Court Appearance

We continue to meet until an agreement is reached or at times until it becomes clear that no agreement can be reached. Once an agreement is reached it is put in written form which the parties present to the court for approval. I do not appear as attorney of record. I prepare the court papers in the names of the parties in such form that if the process fails, the pleadings can be converted for use in the adversary process without prejudice. Copies of the Petition and Response are attached as Exhibit "C^1" and "C^2". The parties agree on who is to be the Petitioner and the Respondent. If they cannot agree a coin is flipped. I don't go to court, except on rare occasions to clarify a problem that may have arisen. The clients appear in propria persona and usually both go to the hearing on the uncontested calendar. I encourage both of the parties to go. Most clients prefer this. The conjoint appearance in court is consistent with the mutuality of the process. I prepare a "script" for the moving party to read to the court. A copy is attached as Exhibit "D". I have had to go to court to "clarify" things only three times.

That is the process in a nutshell. The following may be helpful to understand what has taken place in my practice.

Some Statistics

I have seen more than 200 couples. I have "analyzed" 168 of these files. 87 (51.7%) of the cases have gone to agreement and divorce judgments. 67 (3[illegible].8%) had one or more consultations but the parties did not continue to an agreement and it is not clear to me if they reconciled, just stayed separate, went into the adversary process, or went on to other non-adversary resolution. There were 14 cases (8.3%) in which there was substantial consultation with me but the process broke down and the parties completed their "divorce" in the adversary system.

I was able to analyze the time involved in two groups of cases that went to agreement. The first group consists of 29 cases concluded earlier in my practice. The average time "logged" was 16.33 hours. The second group consists of 17 more recent cases. In that group the adverage time logged was 21.01 hours. Another breakdown of the times looks like this:

First group of 29 cases

Hours	Cases
5-10	6
11-15	10
16-20	5
21-30	5
over 30	3
	29

Second group of 17 cases

Hours	Cases
5-11	7
12-15	3
16-29	3
30-40	2
over 40	2
	17

Fees

I charge by the hour and bill monthly. I ask for no retainer. I recommend that each party pay one-half of the bill. If there are community cash resources I suggest that my fee come from those funds. If one party pays all of the fee I often suggest that that client get a credit when the community property is divided. These are general rules. There are exceptions. I have had a few problems in collecting fees from disappointed clients and some others are rather slow in payment. Generally I am paid regularly. The same resistence to fees is experienced as in my non-mediation cases.

Training and Education

After a year or so of doing this work I decided to get a degree in counseling and I entered a graduate program, received an M.A. degree and eventually became licensed as a marriage family child counselor in 1978. I have a separate counseling practice which I conduct in a different office from my legal work. My special training as a counselor gives me additional insights and flexibility which I find invaluable. I don't think every lawyer who does "mediation" need obtain that much education and training. It does not hurt, of course. Some minimum education in inter-personal dynamics and human development is necessary. This is true for lawyers in the adversary process but more so for lawyer-mediators. Some lawyers have a propensity for this kind of work because of personality and inclination and others don't. I doubt if many who don't will stay in the work. A sense of self awareness is absolutely essential for a lawyer who does this kind of work.

Useful Techniques

A few props are very helpful if not necessary. A blackboard or a similar device for purposes of "in-session" illustration is useful. Desks or other writing surfaces that each client can use should be available. It is preferable not to have a big desk separating the attorney from the clients. A copy machine should be available so the clients and the lawyer can have the same material before them.

During the sessions role-playing an independent adversary attorney for each party is an essential part of the process. From time to time each client is addressed by the lawyer-mediator as if he/she were that party's lawyer and the other party were not present. This is a simple and dramatic way to bring reality to the clients.

Most important is the use of post-session letters which summarize what happened at the last meeting. Statements of the legal and psychological implications of alternative courses of conduct are indicated. Copies of statutory or case material that are relevant often accompany the letter.

I have set forth in Exhibits "E^1, E^2, E^3 and E^4" four excerpts from letters to clients which illustrate the use of this technique. It is time consuming and expensive so I get the clients' permission before doing it so there are no surprises in the monthly billing. In any case, if I don't use the post-session letter I try to dictate a memorandum to the file after each session as the "give and take" of the sessions often makes note-taking ragged at best.

Child Custody

Most of my clients are not in great conflict over child custody. The agreement about the children often seems to be a lubricant that makes the process function more smoothly. The presence of children is the evidence that the entire marriage is not obliterated by the judgment of dissolution. It often supplies the motivation for cooperation where otherwise it would not be possible.

I will, and have on infrequent occasions, see the children, both with and without the parents. Most of my clients seem to have been involved with one or more counselors or therapists before they see me. If not, I often make referrals, usually, but not always, around the child custody issue. Joint custody is a very important part of the life style of many of my clients and therefore is an important issue in the negotiations.

Conclusion

I have attempted to set forth in this paper the way I set up and carry out my non-adversary family law practice. There is much omitted because of space and time limitations. Also I am more the clinician than the researcher. I think, too, there is some resistance to looking at closed files. I hope enough has been preserved and presented to be helpful to others interested in this challenging and difficult enterprise.

The motivation for my original shift from the adversary system still remains the same. Let me close by referring to the letter to my partners in 1971 in which I told them why I thought a change was in order for me and the system. After all this time it still says it the way I felt it then and the way I feel it now.

> First, I have concluded that it is possible to formalize a family law practice in a non-adversary context which would be beneficial to individual clients, socially useful, professionally valid, as well as personally acceptable to me. As you will remember, I have often ventured the conclusion that the adversary procedure is not a satisfactory context in which to attempt the resolution of the problems that arise in family law. I believe that family law is sufficiently different from other specialities to justify treating it with a special consideration...Basically I am convinced that the adversary procedure, with its apparent alternatives of victory or defeat, is inconsistent with the needs of parties whose marriage is in trouble or being dissolved, particularly when there are minor children. At that juncture, the involved persons need understanding of each other in all their relationships and of the reasons for their problems. Such awareness could avoid the need for a dissolution of the marriage or it could contribute immeasureably to an intelligent resolution of the problems if a dissolution is inevitable...Unfortunately, lawyers, judges and others involved in the application of the adversary process to family law cases often interfere with the possibility of an intelligent resolution and create conditions which only complicate and worsen existing situations, which are complicated

and bad enough. The present system of handling family law disputes leads to unacceptable delays, expense and frustration when the matter is "contested"...The result only too often is the aggravation of existing problems and the creation of new ones...Of course there are many examples of satisfactory results under the present procedure. Reasonable litigants, often in concert with good lawyers and/or good judges will avoid the pitfalls. However, the system does not encourage good results. It is essentially oriented towards a contest - which generates a desire to win or a fear of loss. No matter how benign, skillful and wise the attorneys and/or judges, the atmosphere created and fostered by the adversary process is contrary to the real needs of the parties under the circumstances: knowledge about themselves; why they have the problems; how to resolve the problems; how to avoid similar problems...California has made substantial modifications in substantive law which as we know makes the termination of marriage much easier and eliminates some of the most abrasive aspects of previous legislation and common law precedent. I think that the bar should also adjust to the realities. Lawyers can't stop litigants from demanding that their cases be handled like personal injury litigation (although the legislature certainly has made it less profitable) but lawyers can certainly discourage such approach (rather than trade on their clients' mistaken notions as some of our colleagues do) and most important of all lawyers can offer an alternative to clients, an alternative that will permit the client who has marital problems an opportunity to get good legal advice without the necessity of declaring war on his spouse. Under California law today even the acquisitive client must consider whether litigation is a good investment, so surely the bar has an obligation to be a little creative in this area. Before I go into what alternatives this creative member of the bar has in mind, I want to, in the words of our leader, make one thing clear. The Mediteranean sun has not softened my brain to the extent that I see some sort of panacea in what I suggest. I realize only too well that the trouble in family law is often caused by hateful (or pitiful) wretches who either want a pound of flesh or want to surrender one. Whatever rational and humanistic system or procedure may be devised, there will be those misled souls who will reject it or attempt to misuse it for reasons of revenge, punishment or economic advantage. At this point I suggest no more than an alternative. After all, I can't realistically suggest that the adversary system be abolished. In fact I don't want to. What I want is to begin to develop a procedure or system, call it what you will, that will serve a great need, for those who choose to use it. Perhaps it will point the way to reforms or at least alternatives in other areas of settling disputes. God knows we could use it.

EXHIBIT "A"

Excerpt from letter from Henry M. Elson to law partners dated July 7, 1971.

Just what do I have in mind in regard to the mechanics of this non-adversary procedure. As I see it, the lawyer so involved will offer his services to clients who have marital problems at any stage in the marriage or post marriage situation. I shall not define "marital problems" now, but I don't anticipate any problem about that. At the outset the lawyer will make it clear that the advice is not directed to either party but to the family or the "community" and that he will not take the matter to court except to confirm what the parties have agreed to. This means that if either party is not willing to risk the time or money or advantage that might be lost by not assuming an adversary posture the lawyer should not continue to advise them. Once it is agreed that the procedure will be as indicated there should be a discussion about the reasons for the problems and a recommendation, if indicated, of professional assistance from a marriage counselor or other such expert. The lawyer should be available to consult with the marriage counselor if called upon, to be of whatever assistance seems required. If it appears that there will be a separation and some need for disposition of children's custody appropriate experts should be consulted when indicated. Again, the lawyer should be available for consultation as the mechanics and possibilities inherent in submitting child custody questions to a court without an agreement are important. Thus the non-adversary lawyer must be conversant with what is going on in the courts. If it seems that a dissolution is likely the lawyer should then, with the cooperation of the clients, collect all information about the community property of the parties so it can be inventoried and evaluated. If any questions arise as to what is separate or community property the lawyer can assemble the evidence necessary to make that determination. Income and budget information should likewise be elicited from, and with the help of, both parties. A consideration of the needs, resources and income-producing possibilities of each party should follow. In collecting information regarding the nature and extent of community property, and the facts concerning income and budget questions, experts should be consulted as required. This usually will not be necessary but objective advice about taxes, valuations (present and predictable future) or property, job and educational possibilities, can all be very valuable to the parties if they believe they are given without favoring one or the other party. This gets to be one of the stickier questions under the new California law - valuations of community property that is. It will save the parties a lot of dough and time if they can get a fair shot in these matters. Even if the parties can't reach an ultimate agreement and are forced to see separate attorneys the investigation that the non-adversary attorney conducts can be invaluable. Of course, nothing will prevent another attorney from rejecting such "help" but more often than not it will be acceptable and thus a great money and time saver. There are other advantages arising from the non-adversary procedure even though no ultimate agreement is reached. There will likely be agreements fairly arrived at on some issues and something gained from the mutual discussions. Of course the incentive for this procedure will not come from a discussion of the incidental gains from its failure.

After all counseling and other professional assistance has been completed and the parties are still unable to proceed except by dissolution or continued separation, based on the investigation and collection of material concerning property, income and budget, the parties can negotiate, with the assistance of the lawyer, an agreement dividing their property, providing for the custody of children and support payments where appropriate. At this point the lawyer can and probably will be asked to make recommendations. In so doing he plays a quasi-arbitrator role and this requires a good deal of judgment and skill. He must be able to give some idea of what the court might do without suggesting that that would necessarily be correct in the instant case. He must avoid "forcing" a settlement on one of the parties. This will really be a problem. However he will be assisted by the entire atmosphere that will hopefully be generated at the inception of the consultation. A written agreement or a stipulated judgment would follow and then a court appearance with one or both parties appearing in court with the attorney or in pro per with the agreement or stipulated judgment being presented. I believe, at least at this first blush, that fees should be charged on a straight hourly basis.

In a way it sounds like a cop-out to leave the clients*in the hands of lawyers who play it like [reference to specific attorneys] but there's nothing really to be done to modify it short of changing the system or as I suggest here giving clients an alternative to climbing into the ring for one of those 100 round bouts. Naturally there are a million and one questions that remain unanswered. But if the idea has any validity once it gets underway there will be a development of skills, techniques and methods of handling these cases in this manner which will materialize as the cases proceed and experience is gained.

*who stay in the adversary system

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(415) 848-2083

EXHIBIT "B"

This will confirm that we met on 1982 and that I promised to send you a summary of the substance of our meeting and the letter agreement I use in non-adversary family law consultations.

First, in regard to the matter of legal representation, it is important to recall that I advised each of you that you have adverse legal interests in regard to the matters about which you consulted me. This means that a particular resolution of any of the outstanding issues between you, such as spousal support, property division, or even the date of separation may be relatively advantageous or detrimental to either of you, depending on how the issue is decided. Thus, often when married people separate, they retain their own attorneys to negotiate the best result for themselves in these matters. When you both consult me, obviously you are not availing yourselves of this right, and the law requires that you be advised carefully that you have such adverse legal interests, that they are substantial, that you acknowledge that this has been explained to you, that you understand the implications of this advice, and that you consent to this type of representation at this time.

Let me add, without detracting from the significance of the above admonition, that at any time either of you wishes to consult an attorney of your own choice, you should do so. It is not necessary to inform me or the other party that you are doing so. This can occur at the same time you are continuing to consult with me. In short, there is no limitation on your right to be independently advised even while participating in this process.

You should also be informed that in my opinion this non-adversary process is not always appropriate for every individual. Some people who are separating and possibly ending a long and complex relationship simply cannot deal with one another in a manner that permits a cooperatively achieved result. Some other couples who require a "clean break" find this process makes it difficult to achieve that result as it could exacerbate old feelings of anger, dependency, control or guilt. Also, this process does not permit you to be "protected" in the same way that you might expect from the adversary process. This all must be viewed in the context of an area of law which is constantly changing and often difficult to predict. To proceed in this mode, in effect, means that you may give up the opportunity to prevail on some issues in order to secure a workable, mutual arrangement through your own direct negotiation. Please consider carefully whether in light of the above you still wish to continue in this process.

I also consider that I have a confidential relationship with both of you and in any event I will not reveal to others any of your communications to me, or to each other in my presence, without the written consent of both of you. By signing this letter you each agree not to ask me to make such disclosures without your joint consent. I also urge each of you to keep what is said in our sessions confidential so there will be an open atmosphere, encouraging a full interchange of ideas and feelings.

If for any reason we are unable to complete this transaction and you must secure the representation of your own attorneys, I will, of course, not be the attorney for either of you.

One final point about this process. It requires a substantial amount of mutual trust if it is going to work. Unless you direct me to check into the representations of each of you as to relevant facts and evaluations, it is my practice to use that information you give to me as the basis for the negotiations and agreement. As you can see, this requires that each of you be confident that the other person is trustworthy and believable in regard to the facts presented to me.

If in light of the above you want me to continue working with you, please sign the extra copy of this letter sent to each of you and return it to me so I may have a record of your consent for my files.

The following are the issues that typically must be resolved if you go ahead with a dissolution of your marriage or a formal separation agreement.

1. Child custody/visitation
2. Child support
3. Spousal support
   (a) To whom
   (b) How long
   (c) How much
4. Property/Debt Division
   (a) Identification of separate/community property/debts
   (b) Valuation of community property
   (c) Division of property/debts
   (d) Retirement - Social Security
   (e) Effect of separation
5. Life Insurance
6. Medical/Dental Insurance
7. Income Tax (It may be important that your tax adviser play a significant role in these negotiations as I do not consider myself an expert in this area.)
   (a) Liability for pre-1982 taxes
   (b) 1982 taxes
   (c) Consequences of property division
   (d) Consequences of support payments
   (e) Future capital gains
   (f) Implications of separation

Although we didn't necessarily discuss all of these points at our recent meeting, it is my practice to urge my clients to agree to the following when they are consulting with me. By signing this letter you will be bound by the following agreements as well as the above understanding regarding confidentiality.

1. Each of you will respect the privacy of the other in all respects.

2. There will be no transfers of community property pending our negotiations without mutual consent, nor will there be any debts incurred for which the other is responsible without mutual consent. Transfers of separate property acquired during or before the marriage shall not be made without informing the other of the proposed transfer.

3. It is acknowledged that there may be income tax implications in some of the interim agreements between you and that you will attempt to cooperate in this regard to minimize the net tax consequences of your actions.

4. All interim agreements are subject to modification after consultation upon reasonable notice to the other party.

5. My fees are $ an hour plus any costs incurred. My practice is to bill both clients monthly for the entire amount. You may, of course, decide between you how the fee is paid, but each of you is responsible to see that my bill is paid.

In regard to your particular situation, let me mention some of the specifics to which our attention has been directed.

(List specific points for the subject case)

____
Attorney

____
Wife

____
Husband

EXHIBIT "C^{1}"

202-1281

ATTORNEY OR PARTY WITHOUT ATTORNEY (NAME AND ADDRESS) John Doe address [illegible] Petitioner in propria persona	TELEPHONE NO Tel number	FOR COURT USE ONLY
SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA STREET ADDRESS MAILING ADDRESS CITY AND ZIP CODE BRANCH NAME		
MARRIAGE OF PETITIONER John Doe RESPONDENT Jane Doe		
PETITION FOR ☒ Dissolution of Marriage ☐ Legal Separation ☐ Nullity of Marriage	☐ And Declaration Under Uniform Child Custody Jurisdiction Act	CASE NUMBER

1 RESIDENCE (Dissolution only) ☒ Petitioner ☐ Respondent
has been a resident of this state for at least six months and of this county for at least three months immediately preceding the filing of this Petition for Dissolution

2 STATISTICAL FACTS
a. Date of marriage date
b. Date of separation date
c. Period between marriage and separation Years: x Months: x

3 DECLARATION REGARDING MINOR CHILDREN OF THIS MARRIAGE
a. ☐ There are no minor children.
b. ☒ The minor children are:

Name	Birthdate	Age	Sex
Name	birthdate	x	x

c. IF THERE ARE MINOR CHILDREN, COMPLETE EITHER (1) or (2)

(1) ☒ Each child named in 3b is presently living with ☒ Petitioner & ☒ Respondent (if joint custody)
at (address): give both addresses if applicable

and during the last five years has lived in no state other than California and with no person other than petitioner or respondent or both.

Petitioner has not participated in any capacity in any litigation or proceeding in any state concerning custody of any minor child of this marriage.

Petitioner has no information of any pending custody proceeding or of any person not a party to this proceeding who has physical custody or claims to have custody or visitation rights concerning any minor child of this marriage.

(2) ☐ A completed Declaration Under Uniform Custody of Minors Act is attached

(Continued on reverse)

The declaration under penalty of perjury must be signed in California, or in a state that authorizes use of a declaration in place of an affidavit, otherwise an affidavit is required.

Form Adopted by Rule 1281
Judicial Council of California
Revised Effective January 1, 1980

PETITION
(FAMILY LAW)

CC 4503, 5158, CRC 1215

4 DECLARATION REGARDING COMMUNITY AND QUASI-COMMUNITY ASSETS AND OBLIGATIONS AS PRESENTLY KNOWN

a ☐ There are no such assets or obligations subject to disposition by the court in this proceeding
b ☒ All such assets and obligations will have been disposed of by written agreement prior to interlocutory hearin
c ☐ All such assets and obligations are listed in the property declaration to be filed with this petition
d ☐ All such assets and obligations are listed below

*or all such assets and obligations will be presented at the time to the court and submitted for disposition.

5 ☐ Petitioner requests confirmation of the following as separate assets and obligations

ITEM	CONFIRM TO

6 Petitioner requests

a ☒ Dissolution of the marriage based on
  (1) ☒ irreconcilable differences. CC 4506(1)
  (2) ☐ incurable insanity. CC 4506(2)

b ☐ Legal separation of the parties based on
  (1) ☐ irreconcilable differences. CC 4506(1)
  (2) ☐ incurable insanity. CC 4506(2)

c ☐ Nullity of void marriage based on
  (1) ☐ incestuous marriage. CC 4400
  (2) ☐ bigamous marriage. CC 4401

d ☐ Nullity of voidable marriage based on
  (1) ☐ petitioner's age at time of marriage. CC 4425(a)
  (2) ☐ prior existing marriage CC 4425(b)
  (3) ☐ unsound mind. CC 4425(c)
  (4) ☐ fraud. CC 4425(d)
  (5) ☐ force. CC 4425(e)
  (6) ☐ physical incapacity CC 4425(f)

7 Petitioner requests that the court grant the relief or judgment specified in item 6, make injunctive and other orders as may be proper, and that

a ☒ Visitation rights be determined and child custody be awarded per agreement, or court order.
  ☐ Petitioner ☐ Respondent ☐ Other (specify)
b ☒ Child support be awarded ☐ Petitioner ☐ Respondent per agreement or court order.
c ☒ Spousal support be awarded ☐ Petitioner ☐ Respondent or not, per agreement or court order.
d ☒ Property rights be determined if parties cannot agree.
e ☒ Attorney's fees and costs be awarded ☐ Petitioner ☐ Respondent or not, per agreement or court or
f ☐ Wife's former name be restored (specify)
  (if applicable)

Petitioner declares under penalty of perjury that the foregoing, including any attachment, is true and correct and that this declaration is executed at (place) , California
on (date)

(Signature of Petitioner)

John Doe
(Type or print name of [illegible]) Petitioner

Petitioner in propria persona
[illegible]

202-1282

EXHIBIT "C2"

ATTORNEY OR PARTY WITHOUT ATTORNEY (NAME AND ADDRESS) Jane Doe address [illegible] Respondent in propria persona	TELEPHONE NO Tel number	FOR COURT USE ONLY
SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA STREET ADDRESS MAILING ADDRESS CITY AND ZIP CODE BRANCH NAME		
MARRIAGE OF PETITIONER John Doe RESPONDENT Jane Doe		
RESPONSE ☒ REQUEST FOR	☒ Dissolution of Marriage ☐ Legal Separation ☐ Nullity of Marriage ☐ And Declaration Under Uniform Child Custody Jurisdiction Act	CASE NUMBER

1 RESIDENCE (Dissolution only) ☐ Petitioner ☐ Respondent
has been a resident of this state for at least six months and of this county for at least three months immediately preceding the filing of this Petition for Dissolution

2 STATISTICAL FACTS
a Date of marriage date
b Date of separation date
c Period between marriage and separation
Years X Months X

3 DECLARATION REGARDING MINOR CHILDREN OF THIS MARRIAGE
a ☐ There are no minor children
b ☒ The minor children are

Name	Birthdate	Age	Sex
Name	x	x	x

c IF THERE ARE MINOR CHILDREN, COMPLETE EITHER (1) or (2)

(1) ☒ Each child named in 3b is presently living with ☒ Petitioner & ☒ Respondent (if joint custody)
at (address) give both addresses if applicable

and during the last five years has lived in no state other than California and with no person other than petitioner or respondent or both

Respondent has not participated in any capacity in any litigation or proceeding in any state concerning custody of any minor child of this marriage

Respondent has no information of any pending custody proceeding or of any person not a party to this proceeding who has physical custody or claims to have custody or visitation rights concerning any minor child of this marriage

(2) ☐ A completed Declaration Under Uniform Custody of Minors Act is attached

(Continued on reverse)

The declaration under penalty of perjury must be signed in California, or in a state that authorizes use of a declaration in place of an affidavit, otherwise an affidavit is required

Form Adopted by Rule 1282
Judicial Council of California
Revised Effective January 1, 1980

RESPONSE
(FAMILY LAW)

CC 4355, CRC 1215

4 DECLARATION REGARDING COMMUNITY AND QUASI-COMMUNITY ASSETS AND OBLIGATIONS AS PRESENTLY KNOWN
  a ☐ There are no such assets or obligations subject to disposition by the court in this proceeding
  b ☐ All such assets and obligations or* have been disposed of by written agreement prior to interlocutory hear
  c ☐ All such assets and obligations are listed in the property declaration to be filed with this response
  d ☐ All such assets and obligations are listed below

*or all such assets and obligations will be presented at the time to the court and submitted for disposition.

5 ☐ Respondent requests confirmation of the following as separate assets and obligations

ITEM	CONFIRM TO

6 ☐ Respondent contends there is a reasonable possibility of reconciliation

7 ☐ Respondent denies the grounds set forth in item 6 of the petition

8 ☒ Respondent requests
  a ☒ Dissolution of the marriage based on
    (1) ☒ irreconcilable differences CC 4506(1)
    (2) ☐ incurable insanity CC 4506(2)
  b ☐ Legal separation of the parties based on
    (1) ☐ irreconcilable differences CC 4506(1)
    (2) ☐ incurable insanity CC 4506(2)
  c ☐ Nullity of void marriage based on
    (1) ☐ incestuous marriage CC 4400
    (2) ☐ bigamous marriage CC 4401
  d ☐ Nullity of voidable marriage based on
    (1) ☐ respondent's age at time of marriage CC 4425(a)
    (2) ☐ prior existing marriage CC 4425(b)
    (3) ☐ unsound mind CC 4425(c)
    (4) ☐ fraud CC 4425(d)
    (5) ☐ force CC 4425(e)
    (6) ☐ physical incapacity CC 4425(f)

9 Respondent requests that the court grant the relief or judgment specified in item 8, make injunctive and other orders as may be proper, and that
  a ☒ Visitation rights be determined and child custody be awarded per agreement or court order.
    ☐ Petitioner ☐ Respondent ☐ Other (specify)
  b ☒ Child support be awarded ☐ Petitioner ☐ Respondent per agreement or court order.
  c ☒ Spousal support be awarded ☐ Petitioner ☐ Respondent or not, per agreement or court order.
  d ☒ Property rights be determined if parties cannot agree.
  e ☒ Attorney's fees and costs be awarded ☐ Petitioner ☐ Respondent or not, per agreement or court order
  f ☐ Wife's former name be restored (specify)
    (if applicable)

Respondent declares under penalty of perjury that the foregoing, including any attachment, is true and correct and that this declaration is executed at (place) __________, California,
on (date)

____
(Signature of Respondent)

Jane Doe
(Type or print name of [illegible]) Respondent

Respondent in propria persona
____
(Signature of [illegible] Respondent)

HENRY M. ELSON
COUNSELOR AND ATTORNEY AT LAW
2030 MILVIA STREET
P. O. BOX 1029
BERKELEY, CALIFORNIA 94701
(415) 848-2823

EXHIBIT "D"

This letter will constitute suggestions as to how you should handle the uncontested dissolution hearing scheduled for at 9:00 a.m. in the Alameda County Superior Court. The hearing will probably be held in Department 28 on the third floor of the County Building located at 1221 Oak Street, Oakland, across the street from the County Courthouse. We will know on Thursday afternoon if the case is scheduled in another department.

First, I suggest you both go to court, but only . as the Petitioner must go. She will be the witness and even if goes there will not be much for him to say except perhaps to identify his signature and state that the agreement is satisfactory to him.

You should arrive at the courtroom a few minutes before 9:00 a.m. You will have the packet of papers that I will provide for you which will be presented to the clerk who sits next to the Judge's chair. The clerk will tell you when the case will be called. When it is, will be sworn in and will take the witness chair and should say the following, which could be read from this very letter:

1. I am , the Petitioner.

2. the Respondent, is my wife (husband_.

3. The petition was filed on (. .. At that time I had been a resident of Alameda County, California for more than six months continuously.

4. We were married on

5. We separated on

6. We have one child the issue of our marriage, born

We have agreed, subject to court approval, that we should have joint legal custody of , and that subject to my rights of reasonable visitation shall be in the physical custody of my wife;

7. I have agreed to pay $300 a month for child support, payable on the first day of each month and I shall continue to pay these sums during the minority of I understand that child support is always subject to modification by the court.

8. We have also agreed, subject to court order, that the present medical and dental coverage available through my employment shall be maintained by me so long as it is available. If it is no longer available I shall give notice to my wife and we shall negotiate another arrangement for medical and dental insurance. All ordinary medical and dental bills not covered by insurance shall be paid for by my wife and all extraordinary medical and dental bills not covered by insurance shall be paid for by me.

9. I have agreed to pay my wife spousal support as set forth on the payment schedule described in the proposed interlocutory judgment. My wife and I have agreed that after the payment of spousal support, no further spousal support payments will be made by me. We also agreed that my obligation to make these payments is not modifiable either by way of increase or decrease, nor is the period of my liability modifiable. However, we both agreed that the spousal support payments shall terminate if my wife remarries before or if either of us dies before that date.

10. I waive my right to spousal support, with the understanding that such waiver is irreversible, irrespective of change in circumstances.

11. We have divided our property equally in a written Agreement, which Agreement is attached to the proposed Interlocutory Judgment which I have given to the clerk. I can identify the signatures on that Agreement as those of my wife and myself. We are both satisfied with the terms of this Agreement.

12. Prior to our separation, irreconcilable differences arose between us which led to the irremediable breakdown of our marriage. There is no possibility of reconciliation.

12. The matter may be submitted, Your Honor.

The packet of papers you have are:

1. Original and three copies of proposed Interlocutory Judgment of Dissolution of Marriage, to which are attached original and copies of the Agreement signed by both of you.

2. Original and two copies of Notice of Entry of Judgment and stamped envelopes addressed to each of you and to me.

The clerk should return three copies of the Interlocutory Judgment (and Agreement), one for each of you and one for me. (Please send or bring that to me.) The rest of the documents will be kept by the clerk.

Very truly yours,

Henry M. Elson

HME/bt
encls

P.S. If for any reason the Judge is unwilling to sign the proposed Interlocutory Judgment just as I have prepared it, it will be your responsibility to ask that the matter be dropped from the calendar so I can be consulted.

HME

EXHIBIT "E^1, E^2, E^3, E^4"

Some excerpts from letters to clients.

1. The following is my response to a client's concern that I was not being objective:

> Let me review where we are. It was in November of last year that A made a proposal for division of assets in a letter dated 11/4/80. B responded in two parts; in a letter dated 1/31/81 and a second letter dated 2/25/81. At that time, during the negotiations B wrote to me with concern about my objectivity. We dealt with that in telephone conversations and I hope he feels comfortable about that issue now. It frequently is a problem in these matters to keep the confidence of both parties when so many emotional factors impinge on the legal-financial issues. I am pleased that B was willing to express his feelings as he did and I expect each of you to continue letting me know when you feel something on my part is causing you concern. I will try to do the same.

2. The following is a portion of a letter I wrote during protracted negotiations, reminding the parties of the confidentiality issue, the right to independent counsel and that I had done no independent investigation of valuation.

> You each must be reminded that, by agreement, the communications from you to each other and to me remain confidential. This makes it easier to be candid in the negotiations without fear of possibly being disadvantaged by that openness if an agreement cannot be reached. While I am reminding you of mutual understandings, please remember that you each have an absolute right to and should consult an independent attorney to make sure you understand your legal position. No matter how hard I try to "role play" what your separate attorneys might advise you about your "legal rights", it is simply not the same as a separate consultation. Finally, in this regard I remind you that I have not done any independent investigation to determine the value of any of the assets, i.e. the residence, retirement, etc. I may allude to this again when I discuss the "variables".

EXHIBIT "E^3"

3. The following is a portion of a letter referring to the issue of spousal support. The parties changed their minds after this letter and agreed to have the court keep jurisdiction.

We discussed the spousal support issue during our November 10th session. Since that meeting B called and informed me that you both agreed to waive your respective rights to spousal support. I believe you both understand that such waiver at this time means that at no future time would either of you have a legal right to support from the other party.

I believe we all agreed that if B's income projections are correct you would each have about the same annual income - $48,000 +. I have asked you about the meaning of that figure and my recollection is that it was a pre-income tax figure. What this could mean in terms of available cash for each of you is not clear to me. I think it appropriate to make a projection of the cash available to each of you based on B's figures. The amount of depreciation available would certainly affect the post income tax cash availability as would other factors possibly. You each are entitled to more detail about the income figures.

It was generally expected that you each would be self supporting at about the same income level based on the allocation of properties and debts. I don't know of any income potential for A other than from her properties. B has income from literary property. Obviously either of you are free to earn money from other investments or jobs, or writing. It would appear that neither of you would have a present need for support assistance from the other party at this time.

It is my opinion that if either of you requested it, the court would retain jurisdiction ($1.00) per year to award future support if the requesting party was unable for reasons beyond that person's control to continue to be self supporting. To waive that right is giving up a valuable right. Obviously it can be done legally if you both agree. Whether it is wise is another question. If I were A's lawyer I would be very careful to remind her that B has been the source of most of the expertise that led to the accumulation of your very ample community property. It could be argued, morally, that he has done his share and now you should release each other from future obligations. No one could say that B was being outrageous to take that position. However, there is no retirement plan for either of you and it is not clear whether either of you is covered by social security (I suggest that be checked out with the local Social Security office).

EXHIBIT "E^{3}"

If the proposal B made for division of property and debts is accepted by A, she will be relying on his wisdom and fairness and also cutting off all ties for legal support if the economics don't work out for her. If I were B's lawyer I would argue that you both have exactly equal estates and approximately equal incomes and there is no basis for an award of spousal support when the parties are independent. Frankly, as I said above, it is my opinion that a court would not refuse to protect both of you against the future with a retention of jurisdiction. I can supply you with copies of the relevant cases which make this point about lengthy marriages and the retention of jurisdiction to award spousal support.

4. The following is a portion of another letter dealing with the issue of support.

A offered to pay $2800 per month to B for her support and that of the children. You bargained around a bit and B agreed to take $3000 per month. Before this is finalized I told you both I would have to carefully analyze this issue, particularly in light of B's apparent intention not to get separate representation. I must point out to B the implications of this proposal. I don't want her to request more or in any way upset an agreement you are able to reach, but I must point out the context in which the proposal is made - or else the consent elicited is not an informed consent and possibly subject to being overturned by a court for that reason. You estimate that in addition to the $36,000 which A would pay B annually, there would be the following additional pre-tax income to B from the property she will receive under the proposal on the table.

Ranch rent	$ 5,812
Blank dividends	14,000
Dividends, 1/2 community securities	689
Dividends, B's separate portfolio	3,700
Interest, B's separate accounts	882
	$ 25,083
Support	36,000
	$ 61,083

The criteria used to determine support are numerous. First there has to be a division between child support and spousal support. The net after-tax incomes and the budgeting needs of both parties are the most important of the variables. The determination of what is an acceptable budget, of course, is dependent on what is available and to an extent what the standard of living was prior to separation. B's rough monthly budget for herself and the children came to $2104, not including income tax. A copy of that budget is enclosed. It does not contain figures for medical/dental expenses not covered by insurance, nor is there a figure for house maintenance. A did not submit a budget and his income was quite hard to concretize because of the many uncertainties that are involved. A estimates that his post-tax income available for living expenses and support is about $8000. He has very large mortgage payments on his new house. His income was somewhat lessened because he used income producing assets to buy the house. Suffice it to say, there is a broad range of reasonableness in this area. Obviously each family is different. The important thing is to be sure you have covered all income and all the expenses. Also, you must be aware that child support is always subject to modification and so is spousal support in the absence of an agreement to the contrary.

We did not reach any conclusions about a termination date (if any) for spousal support nor a division of the gross support sum into spousal and child support. It is possible to have all the support considered spousal, which will "up" B's tax and lower A's. Another matter we must legislate about is what happens to the support (if anything) when the children reach majority. Apparently there are outstanding custodial accounts and trusts available for the children when they reach 18 (maybe before) and that too must be taken into account. My feeling is that A is interested in a monthly sum ($3000) for a limited number of years after which each of you will be on your own. B must consider how she feels about this. Is she wiling to "be on her own" after, let us say, the youngest child reaches 18? As I told you, because of the length of the marriage I doubt if the court would terminate support without retaining jurisdiction unless B agreed to it. It is important that this part of the arrangement be understood. It involves the concept of $1.00 per year support. This means that even after the need for support may have ended the court retains the power to resume it if there is a change in circumstance. I can explain this further if it isn't clear.

There are collateral questions to the support issues regarding medical and dental insurance and life insurance. B has budgeted an item for medical insurance. I think A covers the children through a plan from his business. This should be confirmed. We should cover, in the agreement, the possibility of extraordinary medical and dental expenses not covered by insurance. Possibly the trusts would be available for those purposes.

INVOLVING CHILDREN WITHIN THE DIVORCE MEDIATION PROCESS

W. Patrick Phear; Director, Children's Judicial Resource Council,
Panel Member, Children's Hearings Project

SUMMARY:

The Children's Judicial Resource Council has begun to routinely involve the children in their parent's divorce mediation: using skills acquired through the Children's Hearings Project. Children are anxious about their own lives during divorce and can be helped to participate constructively at a level appropriate to their age. The resulting family agreements are not limited to issues dealt with in traditional separation/divorce agreements. Three representative case studies are presented and discussed.

INTRODUCTION:

The traditional adversarial divorce process offers minimal hope or opportunity to the children of the divorcing parents to seek and to obtain answers to those questions that they find most pressing. Wallerstein and Kelly[1] note in their longitudinal study of children of divorce that the children experienced an enormous sense of loss and widespread anxiety about their own present and future. The children were not only concerned about the potential loss of one, or both, of their parents but also about their parents' distress. They were concerned too about possible changes in their own lives; money, schools, moving from homes and neighborhoods, and about their future educational plans. All these issues have to be dealt with, or ignored, within a confused, often lonely, often hostile home environment with one or both parents actively competing for the child's love and allegiance.

In addition to these parent/child issues that are uniquely related to the parents' divorce or post divorce conflicts, the children face the same stresses and tensions that are often experienced in other two-parent and single parent homes: what are the curfew hours? Who is paying for clothes and how much? What chores are expected and accepted? And who is paying the child's allowance - how much and when? These issues may be relatively unimportant to a parent going through the turmoil of a divorce but to the child the resolution of these issues is important both materially and symbolically.

For the children involved, an ongoing divorce mediation is a potentially useful intervention point. The experience and skills developed by the Children's Hearings Project (see preceding article), are invaluable; children can be helped to participate in their parents' mediation process at a level appropriate to their age. Their participation can not only help them to resolve some of their own more pressing concerns but it can also serve to initiate a process through which future tensions can be resolved.

One rationale for divorce mediation is that self-worked agreements are perceived by the participants as being more equitable and are, therefore, more durable. Divorce mediation is reported to affect positively the parents' ability to interrelate with each other after the divorce[2,3]. It is likely that similar benefits would accrue through the children's involvement in the divorce mediation process. In addition their involvement may serve to minimize the children's urge to overtly or covertly sabotage those elements of the agreement that they find burdensome. Even children too young to play a substantive role within the process can benefit through the reassurance they gain by seeing their parents sitting down together, in a familiar room, cooperatively working to resolve issues that the child knows affects him or her. In addition, this kind of involvement serves to reinforce for the parents that it is necessary that they begin to separate their roles as parents from their spouse or ex-spouse role.

PROCESS

All divorce mediations begin only after a 'mediation contract' has been signed by the parties, and their lawyers if they are to be present. The contract addresses, among other issues, the need for full disclosure, confidentiality, and the need to make decisions in the light of the children's best interest and needs. In addition an absolute deadline is set for the final mediation session, usually a date three to four weeks in the future.

At the first mediation session the agenda and content of the entire mediation process is developed, and each party sees the mediator alone for a short 'private session'. This is usually the only time that the mediator will spend alone with either party. The parties' lawyers are always welcome, but most parties do not feel the need to include them in the face to face mediation. The parties are expected to do a considerable amount of work between sessions, including budget development and exploring housing, educational and other personal options. It is in the latter stages of mediation that the children's input is most useful.

A modified version of the traditional labor management mediation model is followed; the mediator's role is to help the family use its own unique knowledge of their resources and skills to design an agreement that they find workable and equitable. Expert advice, when it is needed, is supplied by bringing the appropriate expert (accountant, independent lawyer, or therapist) into the process. The final mediation agreement is signed by all parties and then framed in the appropriate legal language by one of the parties' lawyers before becoming part of the family's legal documents. Most couples reach full agreement in six to seven hours, spread over several sessions.

SETTING THE STAGE FOR INVOLVING THE CHILDREN

It is important that the mediator who contemplates involving the children in an ongoing divorce mediation process clarify several issues for himself prior to involving the children:

1. Is it likely that the mediation is going to result in an agreement?
2. Do the parents really want, and are they ready for, the children's input - or is this a search for further fuel for their fight, or an additional advocate for one party?
3. Are the parents capable of constructively interacting with each other, in front of their children, without any outbursts of explosive anger?
4. Is it possible to limit the content of the discussion to those areas of the agreement that affect the children?
5. Does the mediator feel comfortable with the role of mediator, as opposed to therapist, lawyer, or parenting expert within this expanded mediation format?

6. If the children are older, to what extent are the parents willing to consider making changes that their children might want?
7. Where (whose house) will the mediation take place? (The young children will probably not want to sit through one or two hours of mediation, they will want to drift in and out.)

The mediator will need to raise the question of the children's involvement early in the process or as one of the desirable outcomes of the mediation and as something that the parents can work towards. The need for the parents to act cooperatively and constructively within the mediation process with their children should be explicitly addressed; later the parents can be helped to focus on the extent to which the children are to be involved and over which issues. The mediator might find it necessary to do a considerable amount of reality testing, particularly around the involvement of very young children. The following three vignettes, each involving children of quite different ages, are fairly typical examples of how the children were involved in their parents divorce mediation.

PRE SCHOOL CHILDREN

Children this young can best be involved by allowing them the opportunity to observe the final stages of the mediation process. The Partridge family offers a fairly typical example.

The parents voluntarily entered mediation at the suggestion of the Judge who heard their first pre-trial motion, filed more than a year after the couple had first separated. During that year the parents' relationship had progressively deteriorated, due in part to their severe financial constraints and in part to the difficulties involved in scheduling and managing overnight visits between the father and the four and five year old daughters. A formal contract to enter mediation was signed with the cooperation of the parties' lawyers and the mediation process began.

After about five hours, spread over three sessions, the couple had reached agreement in principal on all major issues and only a few quite simple details still needed to be clarified. Not yet dealt with was the eldest child's expressed concern over her parents' fights. It was agreed that the final session would take place with the children present, but not participating, in the mother's home early the next Friday evening. It was also agreed that the mother would (and perhaps more importantly, that the father thought she could) prepare the children for the session and tell them why we were meeting - to complete the arrangements that needed to be made in a calm and peaceful meeting.

The father and the mediator arrived simultaneously. The mediator was introduced to the children and they were reminded that he was the person 'who was helping them work out their arrangements'. The session started exuberantly and fairly emotionally, it was the first time in over a year that the father had been in the house, and the children wanted to show him the changes that had been made in their bedroom. The session then began, as planned, by dealing with relatively non-threatening logistical details of the previously agreed on visitation schedule. The session was interrupted several times by the children's repeated requests for their father's attention. The visitation arrangements were finalized, with the necessary back up and contingency plans made, and then the whole agreement was reviewed for the last time and signed. The session ended just over an hour after it had started.

SCHOOL AGE CHILDREN

The Evans family contracted to enter mediation soon after they had agreed to separate and file for an uncontested no-fault divorce. Their two children Mary (8) and John (11) continued to live in the family home with their mother. The parents were very angry with each other, but little of this had been overtly shared with the children.

The original agreement worked out with the aid of a therapist and two lawyers before the couple had formally separated called for the children to live with their mother and to visit with the father each weekend and on Wednesday evenings. The father liked and wanted to maintain this arrangement. The mother was very dissatisfied and wanted to file for a contested divorce and to obtain control of the visitation. Her major complaint was the chronic disruptions to her, and the children's lives, particularly the Wednesday evening visits. After two hours of mediation several points of agreement were reached; neither they nor their children really thought that the current visitation arrangements were ideal; they did want to solve this issue themselves, rather than having an 'imposed' decision made for them. They also agreed that some of their earlier claims and counter claims, passed to each other through their lawyers, were exaggerations; that any new arrangement had to be given a chance to work, but should be changed if necessary; and that visitation did not always have to involve both children. The next session was scheduled for the following Saturday morning, to be held with the children present in the fathers apartment.

At this session the mediator was introduced to the children, and the goals for the meeting were summarized: to arrange the next six months visitation schedule. Each parent then reiterated, in front of the children, that they wanted the children to be able to spend time with both of their parents, that they did not want to take time away from the other parent, and that they wanted things to be easier for the children. Mary promptly announced that she wanted to spend time alone with her Dad, and John said that he wanted to be able to spend time with both his Dad and his friends. Partway through the ensuing discussion the children left to watch television and returned for the final summing up of the new schedule: a four week cycle. On the first and third weekends both children would spend Friday night through late Sunday afternoon with their father. The second weekend would be spent with their Mother, and the fourth weekend one child would visit the Father and the other child would remain with the Mother. The Wednesday nights would be retained, but limited to an early supper. The children were delighted with the arrangement, and it was mutually agreed that the arrangement would start that very weekend with Mary staying alone with her Father.

The original separation agreement was revised to reflect the agreed upon changes and filed as part of their uncontested 'no-fault' divorce documents. The agreement was not modified at the end of the six month period.

ADOLESCENTS

Involving older children can require significantly more work on the mediator's part: it can also be very rewarding for the children. With the parents' permission and full cooperation the mediator can arrange to sign a contract with the parents and their children to mediate a family agreement to resolve their issues. Over the course of several hours, meeting briefly with the family both together, individually, and in parent/child subgroups, a parent/child contract is developed to explicitly address those issues that the family feels conflicted or confused about. In contrast to adult/adult mediation, where wide ranging hypotheticals are frequently very productive, adult/child mediation seems to work best if the mediator restricts discussion to sequential but limited and specific proposals and alternatives. It is extremely easy for the mediator to lose the trust of the children and consequently be seen as merely an agent of the court or as an advocate for one of the parents. The mediator might have to work hard to limit the issues under consideration to those that the mediation session can realistically resolve, and to acknowledge but defer those issues which can not be resolved that session, or that require a referral to a different resource.

The Smith's two teenage daughters lived with their mother and their 16 year old son with his father, an arrangement sanctioned by the court six months earlier through 'temporary orders'. The divorce had not yet been heard, as the parents could not agree on the ownership of the house or, more recently, on who should have custody of the children. The mediation referral had been made, and accepted, in the course of a court hearing in which the father had petitioned for sole custody (legal and physical) and the mother had cross-filed requesting larger support payments and charging the father with spouse abuse. The contract to enter into mediation, which included a court-imposed three week deadline, was signed at the courthouse by both parents, their lawyers, and the mediator. By the parents' choice, the lawyers were not present at any subsequent time.

After nearly three hours of divorce mediation (two sessions separated by ten days) including two lengthy (half hour) private sessions the following points were agreed upon:

-Neither parent trusted the other, though they did agree that they were both caring and good parents.

-They would not use violence to solve their disagreements.

-The father did not have enough space in his apartment for all the children to live with him; he acknowledged that he did not really want the girls to live with him but that he wanted to show them that he would have them if it was necessary.

-The ownership of the house was resolved: each parent would receive half of the current equity, but the transaction would only occur in three years time.

-Both parents thought that the children had been 'playing' each parent off against the other, and that the children were good kids but were getting out of control, particularly around curfew hours. (They did not agree on what the curfew hours were.)

-They agreed to ask the children to help them resolve those issues that the children had control over, and that if the children were willing they would arrange for the mediator to meet with the children.

The mediator met with the children alone in his office for half an hour. He noted that there was a lot of talk going on about new ways of doing things in their family, asked if they would like to be part of that, explained the process and philosophy behind mediation, and some of the limits. They agreed to try it, and the whole family met with the mediator, at the mother's house, the next evening at which time a family mediation contract was signed and the process began with every one present. In private, the children expressed their growing concern about their future, particularly their education and their parents' escalating violence and hostility toward each other. They were NOT asked about their custody preferences, but were asked how they would like to arrange to spend time with each parent and for their views about their curfew hours. The parents rejoined the mediation and expressed their concerns about curfew hours and the number of chores that were not being done. The children expressed their concerns about their education and the parents' fighting. A family agreement was reached in slightly under two hours, written up and signed by all parties. (Appendix 1) The parents then told the children of the financial arrangements that they had arrived at and reviewed the separate households' financial positions. Parts of the family agreement were incorporated into the final divorce agreement outline and this agreement was signed by the parents (Appendix 2). Rewritten by the parties' lawyers it became part of the official record when the divorce was heard, and granted, on schedule the next week. The family has not needed additional dispute resolution help in the ensuing four months.

CONCLUSION:

Both parents and children report that they find the children's involvement in the mediation process to have been rewarding and helpful. The model that is used requires a substantial amount of flexibility on the mediator's part. Sessions are scheduled at the family's convenience and often require that the mediator travel considerable distances to the children's home. I believe that this investment is justified; it serves as a clear statement of the mediator's respect for the parents and concern for the children. It usually engenders a reciprocal response in the parents, who appear to become more flexible and reasonable both in terms of their personal interaction and in their decision making. No comprehensive or long term evaluation of the process has yet been undertaken.

Cases referred to the Children's Judicial Resource Council for mediation by the court are seen free, the costs being borne in part through grants from the Scherman Foundation, Inc., and The Cabot Family Charitable Trust. Self referred, and non-court referred cases are charged a per hour fee, set according to ability to pay.

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2. Pearson J. and Thoennes N. (1982), *The Mediation and Adjudication Process: some costs and benefits*. Family Advocate 4(3).

3. Rotenberg E. and Casey J.A. (1978), *A Comparative Analysis. Public Opinions of the Probate Court Judicial Process: Trial v's Pre Trial, the resolution of contested custody cases*. (Unpublished)

APPENDIX 1

MEDIATION AGREEMENT 12/10/81

Parties: Mr. Smith, Mrs. Smith, Ann, Sue, and Roger Smith

1. Mr. and Mrs. Smith agree that they will not fight in front of the children or by telephone; they will attempt to resolve their strong disagreements by letter.
2. Ann and Sue agree to help their mother with the laundry and shopping each Saturday morning. Roger agrees to put out the trash from Mrs. Smith's house each Sunday evening.
3. Mr. and Mrs. Smith are agreed that the children's curfew hours are as follows:

   Ann - week nights 10 p.m., weekend nights 12 midnight.
   Roger - week nights 9 p.m., weekend nights 9:30 p.m.

   they recognize that sometimes the children work later than these hours, and that sometimes the children will want to be out later than these weekend curfew hours.
4. Ann and Roger agree to phone the parent who is expecting them home and to ask permission to stay out later than these hours on those occasions that this is necessary.
5. Both parents agree to cooperate with their children and the school involved to arrange loans and tuition payments for their children's future education.
6. Ann agrees to let Roger play with her dog while she is at work. Roger agrees to not take the dog out of his mother's yard.
7. The family agrees that the children will spend half both Christmas and Thanksgiving day at each parent's house; Christmas morning at one house and Thanksgiving morning at the other parent's house.

8. Roger agrees to attend school each day that he is not sick.

9. Mrs. Smith agrees to pay Sue her allowance each Saturday morning, her allowance is currently $3 each week.

SIGNED: Mrs. Smith Roger Smith
Sue Smith Mr. Smith Ann Smith

MEDIATOR

APPENDIX 2

MEDIATION AGREEMENT 12/10/81

Robert and Joan Smith having separated for eighteen months now wish to arrange their affairs and to file for divorce. They therefore agree:

1. That they shall continue to act together as parents to their three children: Ann (17), Roger (16), and Susan (15). Both parents shall continue to be involved in all major decisions regarding their children's lives and wellbeing; these decisions shall include, but not be limited to, decisions regarding health and dental care, education, holidays and vacations.
2. The children shall continue to reside as they currently live: the two girls with their mother and the son with the father.
3. The children shall continue to visit freely with both parents at their, the children's discretion. The children, being of sufficient age, will be responsible for letting their parents know where they are.
4. Both parents will continue to carry the children on their work related health insurance policies.
5. Both parents will pay equally for the children's dental care, which is not covered on either health insurance policy.
6. Both parents will, to the best of their then current abilities, share the costs of their children's future educational costs. See item 12.
7. Mrs. Smith will be responsible for purchasing the youngest child's clothing, and for this child's allowance. The two eldest children being self supporting in both these areas.
8. Mr. Smith will pay Mrs. Smith $75/week in undifferentiated spouse and child support through the week of June 11, 1982, the amount will then be re-evaluated. (They will each claim the children that live with them as dependents for income tax purposes.)
9. Mr. Smith will be financially responsible for the outstanding credit charges, principal and interest, owed to Sears Roebuck and Grossmans.

10. Mr. and Mrs. Smith jointly own a home located at 9 Averys Road, Boston, Massachusetts. Mrs. Smith will continue to maintain this house, which she now lives in, and will pay all utility costs, principal, interest, and mortgage costs associated with this house. Title to the house will be transferred to Mrs. Smith on August 31, 1984, and at that time Mrs. Smith will pay Mr. Smith a sum equal to one half of the December 1981 equity, or one-half of the August 1984 equity, which ever is the lesser amount. Mrs. Smith will hire an appraiser to determine the December 1981 value and Mr. Smith will pay for the appraisal. Each party will arrange to have their share of the house deeded to the children in the event of either of their deaths prior to August 1984.

11. The parties will file separate tax returns for 1981. Each party will claim the child(ren) living with them as dependents.

12. In the event of a future dispute involving the children, parenting or other child related issue, Mr. and Mrs. Smith agree to try to resolve their disagreement through mediation prior to going to court or involving friends or relatives.

13. This agreement signed subject to each party obtaining independent legal advice.

Robert Smith   Joan Smith

(Mediator)

Alan D. Massengill, J.D.
University of Maryland School Of Law, 1966.
Chairman, Montgomery County Bar Association
  Mediation Committee.
Member, Maryland State Bar Association
  Special Committee On Alternative
  Dispute Resolution.
Member, American Bar Association
  Mediation and Arbitration Committee.
Member, Association Of Family And
  Conciliation Courts.
Chairman, Education Committee, Family Mediation
  Network Of Greater Washington

MEDIATION MODELS: AN INTEGRATED APPROACH

I would like to suggest that every mediator study the family law of the State of Maryland because the statutes and cases lay out the factors relative to the issues in the mediation process. Maryland law, in my view, makes mediation easier in the sense that mediation involves a resolution of four major umbrella issues: alimony, custody, child support and property division/monetary award. You can group all of the issues in any family law case under these four umbrella issues. The nine factors that are considered by the court regarding property division and monetary award are set out in the property statute.[1/] This statute provides for an equitable division of the value of all marital property, regardless of how titled, by considering the nine factors. The factors that are considered in deciding alimony are also set out in a statute.[2/] The concept is that of rehabilitative alimony as opposed to permanent alimony but permanent alimony is possible under certain circumstances. We have an important case and a current law review article delineating the factors that should be considered in a custody decision.[3/] The cases also set out the factors that should be considered in deciding child support.[4/] The mediator should help the couple focus on the various factors

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related to each issue. This helps the spouses deal with reality rather than emotion while working out an agreement on each issue.

The objectives of mediation have to do with problem solving, that is, with working out an equitable solution to the problems the parties face. That goal is to arrive at an equitable separation and property settlement agreement. Notice I did not use the word "fair". Maryland law, like that of the other equitable distribution states, is not concerned with "fairness" in the sense of equal division of the value of property. Maryland law is concerned with an equitable agreement, i.e., whether there was a negotiated bargain acceptable to both parties. The responsibility of the mediator is that of a facilitator to help the couple to work out their own agreement. The objective is to get everything out on the table and assign values and costs and let the couple negotiate with each other as to how the pieces will be traded off or put together.

The mediator, whether a lawyer or non-lawyer, should not engage in a therapeutic relationship with either or both of the spouses. If serious emotional problems are present or develop, which block the progress of mediation, the mediator should suggest consultation with a mental health professional. But the mediator should not try to become a therapist for the couple or for either of the spouses individually. It is my belief that the mediator should see the couple only when both are present.

Does the mediator have to deal with the emotions of either or both spouses? Absolutely. There is no way to avoid it. As attorneys we often try to avoid dealing with the emotions of our clients. At least I think we do. As a mediator you must deal with the emotions, but you can do it in a

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structured way. That is, you try to control how you let the spouses ventilate the various emotions that they are feeling at any given time. As a mediator, you do not permit them, for example, to interrupt each other. You work out an agreement with them whereby you have a right to interrupt either or both of them at any time. You do not permit them to go on and on and on. You do permit them to express their feelings. You do permit them to talk about their anger, what makes them angry, why they are angry. You do permit them to talk about their frustration and their sense of loss. You do permit them to talk about their sense of rejection and their sense of being "had" or "taken" or "life is not fair". And then you point out to them that life is not always "fair". You encourage them to listen to each other. After some time you remind them that they are paying you to sit there and listen and you would be willing to do that for as many hours as they like, but it would be much less expensive to move on and deal with some of the tasks at hand. Most of the time you can nudge them back to focusing on the issues. The net effect is that the mediator engages in reality therapy. That is, the mediator keeps the couple focused on the issue being dealt with, keeps them task oriented, and keeps them future focused.

There are two major points the mediator must keep in mind. The first is that the mediator must be aware that she or he is dealing with people who are generally at the low point in their relationship and probably the low point in their lives. At that point each spouse has a terrible mental picture of the other spouse. At one time they loved each other, they cared for each other, and at this point each may think the other one is an ogre or monster. The mental image needs to be ameliorated. The mediator can help correct that

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mental image. The mediator can, for example, tell them that they are both good people; that they are just in a marriage that, for many reasons, did not work out. The mediator discourages assigning fault and blame. The mediator can point out that they are going to have to look toward the future instead of looking backward at the past. By changing the mental image each has of the other the mediator greatly reduces the probability of continuing hostility.

The second major point that I think the mediator has to realize is that, when the mediation begins, one of the spouses is generally much farther along on the emotional spectrum of the separation and divorce process than the other. Everyone going through a separation and divorce experiences a sequence of emotions as documented in the literature related to separation and divorce. The major problem in mediation is to get and keep the people moving. For example, the emotional spectrum might go from

--shock--to--denial--to--anger--to-- ambivalence--to-- acceptance--

and getting on with life. There is no clear demarcation line from one stage to the next. Usually, there is some vacillation between the phases and the mood swings can be severe but will later smooth out.[5/] If one of the spouses is denying that the marriage is going to end and the other one is at the other end of the spectrum, at the acceptance stage for instance, you have a really difficult situation. If you have one of the people stuck in the anger stage you have a difficult situation. What the mediator wants to do is nudge them along and get them both to roughly the same stage, hopefully the acceptance stage, so that they will be able to negotiate with each other.

The mediator attempts to get the people to some semblance of psychological parity where there will be relatively equal power in the

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negotiations. The attorneys representing the parties can help with this also. The mediator should tell the couple that there will be insistence that the agreement is equitable. The attorneys will insist that they arrive at an equitable agreement and so will the judge. They can work it out in mediation or in the courtroom. They can choose the terms of their agreement or let the judge choose for them. This also helps them deal with the reality of their situation.

How do you help each of the spouses to work through the emotional spectrum and become future oriented? I have found the use of diagrams very helpful. The key to mediation is future focus. You can tell them that you can diagram the deterioration of any relationship on an inverse bell curve. The deterioration occurs over a period of time as does the recovery. There will be at some point a final physical separation. Leading up to that point is what can be referred to as the final stage of the marriage. From the beginning of that stage to the point of emotional separation is what is referred to as the separation distress period, i.e., from some point prior to the actual final physical separation to the point where a person hopefully will reach an emotional separation. Physical separation plus emotional separation equals "non-engagement" or indifference in the good sense of the word. That is, if physical separation and emotional separation coalesce, a person can have a psychological divorce as well as a legal divorce. I have often had clients exhibit an eagerness to indicate in what stage of the process they feel they are, and they can do so with a great degree of accuracy using the diagram. The length of the separation distress period can be decreased with the assistance of a therapist and an attorney working together. I believe mediation can be used to decrease the time period also.

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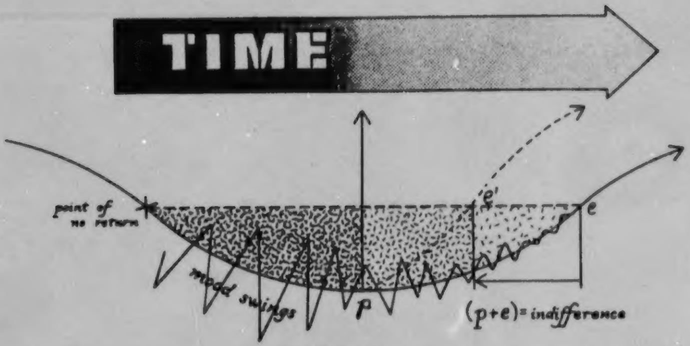

DIAGRAM 1

Another diagram that greatly assists people in dealing with reality is what I call the "emotional sewer" diagram. It could be referred to as a psychological quagmire, but most people seem to respond to the term "emotional sewer" as an apt description of what they experience during the separation and divorce process. This diagram is related to the emotional phase spectrum as well as the deterioration diagram. If one of the spouses has reached a point of no return regarding the marriage, then the marriage will ultimately end. Generally speaking, this spouse has done a lot of thinking and is much farther along the emotional spectrum and will generally be more emotionally stable than the other spouse or at least be able to reach some semblance of emotional stability. Therefore, the objective of the mediator is to try to determine which spouse is probably more emotionally stable and focus on that spouse being the one out of the emotional sewer. The mediator can then indicate that the children will feel much more comfortable spending time with the spouse who is more emotionally stable, i.e., closest to the acceptance stage. If one spouse is in the acceptance stage and one spouse is stuck in the anger stage then the probability of reaching agreement is lower. By using this diagram,

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the mediator can demonstrate that the parent who is out of the emotional sewer will pull the children out with that parent. This diagram can be used to help nudge the other spouse along toward the acceptance stage. If both spouses are in the acceptance stage, then the probability of reaching agreement is greatly increased. Generally speaking, the mediator can use this diagram to positively change the family system by focusing on the spouse closer to the acceptance stage and focusing on the goals of that spouse. Since the children will respond positively to an emotionally stable parent, the other spouse will most likely respond positively also and the family system will be moved toward positive restructuring and out of the emotional sewer during the mediation.

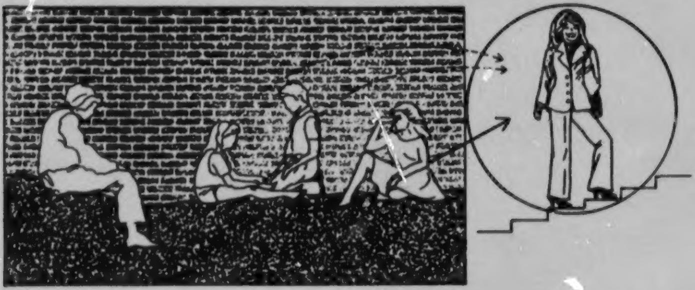

DIAGRAM 2

The mediator should tell the couple that they are involved in, and have been involved in, two of the most important relationships in our society. There is a marital relationship and a parental relationship. You have the husband/father, wife/mother and the mediator can tell them that the marital relationship is going to end but that they will continue to be parents, assuming there our children involved, until one of them dies. The mediator should point out to them that there are three separate and distinct spheres of

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rights and duties. There are the rights and duties of the husband/father, the rights and duties of the wife/mother, and the rights of the children. The mediator should point out that each of them is entitled to have a good relationship with the children. The mediator should point out that the mother must not interfere with the relationship between the father and the children, and that the father must not interfere with the relationship between the mother and the children. The couple should be told that the children have rights. The mediator should try to get them to focus on the rights and interest of the children. Among the rights of the children is the right to have a good relationship with each parent and the right to be supported by both parents. Try to get them focused on how they can work together -- as parents -- and how they can develop trust in each other -- as parents. They once trusted each other as spouses. They still need to continue to trust each other as parents. That is, that each will trust and believe that the other will not damage the children but will be cooperative regarding the health, welfare, and education of the children. Diagram three can be used as a visual aid to demonstrate these concepts.

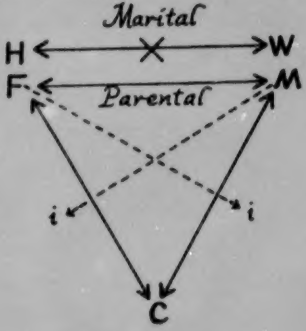

DIAGRAM 3

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The mediator then tries to get them to work on outlining their goals. They each will have short-term goals, intermediate term goals and long-term goals. They must list their individual goals and their joint goals which will generally be related to the children. The couple is encouraged to discuss how they can cooperate to help each other attain their respective individual goals as well as their joint goals. For example, in a situation where the wife has spent some years at home with the children and needs to improve her job skills or complete her education, it should be pointed out that if the husband is willing to help the wife attain this goal it will in turn help him attain his goal of having the wife contribute to her own support at a later time, which will in turn help them attain a joint goal of being in a better position later on to each help with the education expenses of their children. The task of outlining individual and joint goals and discussing how the final list of goals can be attained is a great exercise in dealing with reality. Diagram four can be used to demonstrate how the emotional trauma will decrease over a period of time as they become future focused, maintain a proper perspective, and develop plans to attain each goal.

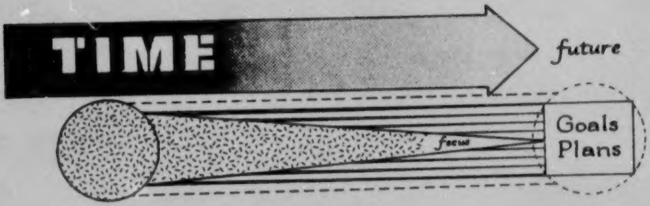

DIAGRAM 4

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By using these diagrams, the mediator can in fact be involved in separation counseling from a pragmatic, reality-based perspective. It is a common-sense approach to discussing the various issues and for encouraging the spouses toward the acceptance phase of the separation and divorce process. This method can help the spouses become future focused in their thinking and can help them cooperate toward working out an equitable agreement, both of which are necessary for a successful mediation.

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1. Courts and Judicial Proceedings Article, Section 3-6A-05, Annotated Code of Maryland.

2. Article 16, Section 1, Annotated Code of Maryland.

3. Montgomery County v. Sanders, 38 Md. App. 406, 381A.2d 1154 (1978); Ester, John W., "Maryland Custody Law-Fully Committed To The Child's Best Interests?", 41 Md. L. R. 225 (1982).

4. German v. German, 37 Md. App. 120, 376 A.2d 115 (1977); Rand v. Rand, 280 Md. 508, 374A.2d 900 (1977).

5. See generally: Hunt, Morton and Bernice; The Divorce Experience, McGraw-Hill Book Company, 1977; Weiss, Robert S., Marital Separation, Basic Books, 1975.

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MEDIATION - AN ALTERNATIVE METHOD OF NEGOTIATION

Patricia E. Shahen, Managing Co-Director
and
Patricia M. Vroom, Associate Director
Family Mediation of Greater Washington

Usually, the first question that we ask couples who come to us for a family mediation consultation session is, "Why are you here?" The answers we get are amazingly diverse. They range from unrealistic expectations on the one hand, to a deep commitment of mutual respect and a desire for transcending pettiness on the other hand. The responses, (spoken and unspoken), sound like this:

- I don't want a bitter court battle.
- I want the mediator to convince my spouse that my position is fair.
- I want the mediator to make decisions for me.
- I want the mediator to give me legal advice.
- I want to save money; mediation is less expensive than going through attorneys.
- I want an impartial person present to give me courage to tell my spouse what I want.
- I want someone to tell me what I want.
- I want someone to help me articulate what I want.
- I want someone to convince my spouse to stay with me.
- I want marriage counseling.
- I want to delay the end of the marriage.
- I want to fool my spouse into accepting less than he or she would get in court.
- I want joint custody of the children and this is the only way I can get it.
- I want to avoid legal discovery so I can hide some of my assets/income.
- I want to learn how to communicate more effectively with my spouse so we can be better parents to our children.
- I want to stand up for myself with my spouse and I want help doing it.

Because we have found such a wide variety of responses, we have prepared the following handout which we give to couples who come to see us for mediation consultations. The handout is designed to acquaint the divorcing or separating couple with the options available to them for assistance in resolving the legal and property issues between them. In the handout we have contrasted the two forms of negotiation available to them under the circumstances, negotiation through attorneys and negotiation through mediation. We believe that deciding which form of negotiation to follow is one of the most important ways a person can structure the ending of his or her marriage. We also stress in the handout that mediation requires each spouse to take responsibility for his or her decisions; and that one of the roles of the mediator is to help the couple learn or enhance their skills of assertiveness, collaboration, good communication and empathic listening.

MEDIATION - AN ALTERNATIVE METHOD OF NEGOTIATION

THE DECISION TO SEPARATE

You have decided to separate or have already separated, but you have not decided to seek a divorce, or

One or both of you has decided to seek a divorce; or

You are already divorced and want to modify your property settlement agreement.

THE ISSUES TO BE RESOLVED

You know that you must decide all or some of the following issues: property division, spousal support, child custody, living arrangements for your child(ren), and child support.

THE METHODS OF NEGOTIATING THESE ISSUES

As a general principle, negotiation is the preferred method for you and your spouse to reach an agreement as to how you should settle the issues arising out of your marital separation. By using negotiation both of you stand a good chance of getting at least some of what you want and need out of the settlement. Neither of you must agree to the settlement until you are satisfied with the terms.

Two well-defined and different processes are available for negotiating: negotiation through mediation and negotiation through attorney advocates. How do you decide which route to follow?

Both methods of resolving family conflicts work well under different circumstances. A decision as to which method to

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use must be based on your goals and your understanding of your family situation.

1. NEGOTIATION THROUGH MEDIATION

Mediation, as direct negotiation, has several advantages over the indirect process of attorney negotiation for couples who share a concern about the welfare of their children and who desire to avoid unnecessary bitterness between themselves. Mediation permits the active involvement of both you and your spouse in reaching a creative plan for transforming a family relationship that is not working into one that both of you can accept. It allows you to separate with maximum dignity.

Mediation will not work unless both of you want it to work and are willing to participate in good faith. The mediator can help you improve the effectiveness of your communication with each other, but can not coerce an unwilling party into working cooperatively.

2. NEGOTIATION THROUGH ATTORNEYS

There are times when skilled attorneys can advance negotiations and when direct contact between you and your spouse may be unproductive. Your attorney will negotiate for you. Part of your attorney's role as a negotiator is to consult with you, to help you understand and accept the reality of your situation, and to make reasonable demands on your spouse. However, an attorney who is not a skilled negotiator may inadvertently prolong the discussions by arguing irrelevant or unreasonable points and the two sides may engage in unproductive posturing rather than real negotiations.

3. THE COURT - WHEN NEGOTIATION IS NOT POSSIBLE

In a few cases, negotiation is not possible, either through mediation or through attorneys. An example would be when your spouse refuses to acknowledge his or her responsibilities to you or to your children. In such cases, the courts are available to make and carry out a decision under the law.

MEDIATION: HOW IT WORKS

CONSULTATION WITH A MEDIATOR

The mediator sees you and your spouse for an initial consultation which lasts from 60 to 90 minutes. During this session the mediator explains the mediation process and answers your questions. The mediator helps you and your spouse to list the matters to be worked out between you and to set the priority for discussion. At the end of this session, each of you is free to decide whether you want to negotiate through mediation.

A TEMPORARY AGREEMENT

During the first mediation session after the consultation, you and your spouse may decide that a temporary agreement as to support, child custody and visitation is necessary. The purpose of this temporary agreement is to stabilize the financial and parental responsibilities for each of you during mediation, and to allow you to negotiate without having to worry about these issues on a day-to-day basis. The temporary agreement is only in effect during the mediation. It does not compromise either of you in negotiating and making a final decision on these issues.

BUDGETS, PROPERTY AND FINANCIAL DISCLOSURE

Each of you will receive a set of forms. These forms ask for specific details as to your property, income, expenses and debts. Full financial disclosure is required.

LEGAL ADVICE - OTHER EXPERT ADVICE

During the mediation, you and your spouse may consult individual attorneys and other experts for advice. You can then use this information in your negotiation.

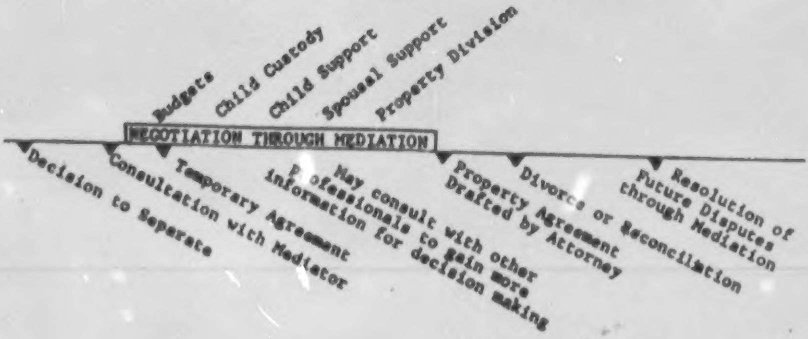
FACING REALITIES

During this process, both of you will have to recognize certain realities; such as: (1) the limits of your resources - before you had only one household to maintain; now you must maintain two; (2) you are each responsible for your own decisions and any solution must be acceptable to both of you; (3) obtaining a divorce is not at issue - mutual consent is not legally necessary to obtain a divorce. If your spouse wants the divorce, your refusal to negotiate or to cooperate during negotiations will not prevent him or her from obtaining a divorce. Once each of you accepts this fact, you will be able to focus your energies on resolving the things which are really in issue.

THE ROLE OF THE MEDIATOR

The mediator does not represent either of you. Instead, the mediator provides a supportive atmosphere for your negotiation, helps you to clarify issues and identify your underlying interests, exposes areas of conflict, and guides you through the process to agreement. For each issue, you and your spouse will identify your specific interests. Then, you, your spouse and the mediator will create as many options as possible which fit these interests. Once you have looked at all the options, you and your spouse will consider which is the best option or combination of options and make a decision.

TIME LINE



Budgets
Child Custody
Child Support
Spousal Support
Property Division
NEGOTIATION THROUGH MEDIATION
Decision to Separate
Consultation with Mediator
Temporary Agreement
Professionals to gain more information for decision making
May consult with other
Property Agreement Drafted by Attorney
Divorce or Reconciliation
Resolution of Future Disputes through Mediation

A COMPARISON BETWEEN NEGOTIATION THROUGH MEDIATION AND NEGOTIATION THROUGH ATTORNEYS.

	NEGOTIATION THROUGH MEDIATION	NEGOTIATION THROUGH ATTORNEYS
Who negotiates?	The couple negotiates directly, with the aid of the mediator.	The attorneys negotiate for their clients, after consulting with them.
Legal advice:	Both may consult their individual attorneys and apply their advice to their negotiation.	Each consults his/her attorney.
Other professional advice:	Both may consult with other professionals, individually and together, so that they may educate themselves and expand their knowledge of options. (We maintain lists of qualified professionals in the areas of tax, real estate appraisals, mental health.)	Each may consult with other professionals, or the attorneys may consult with other professionals in reference to the case.
Scope of the agreement:	All issues arising out of the marriage relationship, including: -child custody -child support -spousal support -property division	All issues arising out of the marriage relationship, including: -child custody -child support -spousal support -property division
Extent to which provisions in the agreement can be individually tailored to the needs of the family:	Because the couple negotiates directly, they can brainstorm with the aid of the mediator, using all information available to each of them, to expand their field of practical options and arrive at the most mutually beneficial result.	Because of indirect communication and ethical constraints on attorneys in their roles as advocates for individual clients, practical options may at times be overlooked
Effects on future relationship:	-Often opens channels of communication between the couple. -Lays foundation for cooperative parenting. -Establishes pattern of cooperation for resolution of future disputes.	-May discourage communication, which sometimes results in escalation of conflicts between the couple. -May undermine feeling of trust between the couple.

A COMPARISON BETWEEN NEGOTIATION THROUGH MEDIATION AND NEGOTIATION THROUGH ATTORNEYS.

	NEGOTIATION THROUGH MEDIATION	NEGOTIATION THROUGH ATTORNEYS
Couple's commitment to the agreement (satisfaction):	Strong. Because each person has a clear sense of what he/she has gained by cooperation, he/she is encouraged to abide by the agreement. Each has participated actively in the process so feels responsible for the result.	Because the parties have played a passive role in the process of negotiating, they may not feel as responsible for the result, nor may they be as aware of what each has gained and lost.
How emotional aspects of separation are dealt with:	-Emotions acknowledged throughout the process. -Mediator can assess couple's interaction and intervene in non-cooperative exchanges to facilitate cooperation. -Mediator trained in conflict resolution.	-Attorney can only see one side of the case because no direct communication with other party. Can't test his/her perceptions of the couple's situation based on communications with his/her own client. -Generally, no special training in conflict resolution.
Professional qualifications:	-Professional degree (in law or mental health) -Plus special training in mediation, communication, negotiation and conflict resolution -Ongoing supervision	-Professional degree (in law) -License to practice law
Does the couple get psychotherapy?	No. Referral to mental health professional. Mediation is task-oriented; geared to the future, not to discovering motivations for marital split or who was at fault. (We maintain a list of qualified therapists.)	No.
Who drafts Property Settlement Agreement?	Couple chooses an impartial attorney advisor or each engages an attorney, one of whom drafts agreement, based on decisions reached by couple in mediation.	One of the attorneys drafts Agreement based on decisions reached in negotiation with other attorney.
Time:	Couple determines. Depends on complexity of issues and readiness & ability of each to negotiate.	At discretion of attorneys. Depends on complexity of the issues and willingness of parties to compromise and skill of attorneys as negotiators.
Cost:	Fairly apportioned between the couple, by agreement. Fees based on an hourly rate.	Each spouse pays his/her seperate attorney. Billing usually based on an hourly rate.

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Professional Responsibility Problems of Divorce Mediation

By Linda J. Silberman*

[This article represents a revision and update of an earlier monograph by Professor Silberman, published in 7 FLR 4001 (1981)]

Divorce mediation is a growing trend in the United States as couples seek alternatives to the traditional adversary model for rearranging their personal and financial affairs.[1] Various types of "family mediation" have been undertaken by lawyers, mental health professionals, and others as part of this new wave. Though individual programs include any number of differing arrangements, mediation contemplates a neutral third party who will guide the parties towards resolution of their marital disputes, outside of, or preliminary to litigation. In the usual situation, the parties will not be individually represented in the mediation; rather the mediator attempts to gain the trust of both parties and helps them to reach agreements on matters of property, support and custody of children.[2] Likewise, in most mediation programs, the mediator does not act as the arbitrator or decisionmaker for the parties.

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*Professor of Law, New York University, Consultant, Post-Graduate Center of Mental Health, Divorce Mediation Project. The assistance of Ms. Randi Zeller, a third year student at New York University School of Law, is gratefully acknowledged.

although several mediation centers add an arbitration component if the mediation itself is unsuccessful.

Proponents of mediation claim it avoids the adversarial relationship and concomitant hostility that often characterizes the traditional divorce process.[3] Also, returning to the parties' responsibility and autonomy in reaching their own settlement of marital disputes will likely mean that agreements will be adhered to.[4] Finally, it is generally thought that mediation will be more expeditious and less expensive than traditional adversarial negotiations or litigation.[5]

The future of divorce mediation is still unclear. Programs are in an early stage, and research efforts and evaluations are only just beginning.[6] What is dismaying, however, is that mediation efforts may be stymied before they have even begun. A variety of restrictive professional responsibility rulings have come from bar associations, which have impeded experimentation with divorce mediation programs. That is not to say that there are not serious ethical issues that must be addressed by the law -- (and indeed the mental health) -- profession. But perhaps what is needed more is serious reflection on how those ethical responsibilities can be met within the structure of individual mediation programs.[7]

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Mediation which is conducted or referred under the auspices of the court or its auxiliary services does not seem subject to ethics challenges.[8] However, mediation which is not court-referred and which takes place independently of an preliminary to any traditional legal processes has been the subject of several ethics opinions and the object of some controversy. The professional responsibility issues implicated by these latter divorce mediation projects depend in part on the type of program used. One can recognize four different mediation "models" in use around the country, each of which raises a distinct set of issues. They are (1) the solo lawyer mediator, (2) the solo therapist, (3) the lawyer-therapist team, and (4) the Coogler variation.

I. THE SINGLE LAWYER MEDIATOR

A lawyer who wishes to undertake divorce mediation as part of his legal practice faces the prohibition of Canon 5, preventing representation of conflicting or potentially differing interests.[9] In non-matrimonial contexts there are exceptions to this prohibition. Dual representation is permitted "in matters not involving litigation,"[10] where the lawyer has "explained fully to each client the implications of the common representation...and the clients...consent."[11] However, representation of both spouses in a matrimonial action has traditionality been viewed as being so inherently prejudicial that dual representation is always prohibited.[12] This classic stance has been taken by most bar associations. With the advent of no-fault divorce, however, several bar committees have departed from it.

Recently, the Ohio State Bar Ethics Committee[13] ruled that although dual "representation" would not adequately protect the parties' rights, a single lawyer could draft a separation agreement so long as (A) the lawyer represented one of the parties and the second party (1) was fully aware that (s)he was not being represented and (2) was given full opportunity to get independent counsel, and (B) both parties gave written consent to the arrangement -- which consent was contained in or attached to the separation agreement. Indeed, the Arizona State Bar ethics committee[14] has gone a step further and approved of dual representation in divorce cases when there are few assets and no children, and the divorce is uncontested. Although emphasizing that dual representation in divorce cases would still be the exception rather than the rule, the Arizona Committee took a significant step in giving couples an option to traditional adversarial divorce. Similarly, a recent case in California[15] permitted dual representation in limited circumstances. The California court, responding to a separating couple's writ of mandamus to compel the court to permit them to be jointly represented in their uncontested dissolution proceeding, stated: "Attorneys who undertake to represent parties with divergent interests owe the highest duty to each to make sure that there is full disclosure of all facts and circumstances that are necessary to enable the parties to make a fully informed choice regarding the subject matter of litigation, including the areas of potential conflict and the possibility and desirability of seeking independent legal advice."[16]

One Virginia ethics opinion did permit an attorney to give non-partisan advice to a husband and wife concerning the transfer of property and to draft the property settlement for both parties.[17] The circumstances indicated that the husband and wife had reached a decision to divorce, apparently without animosity, and had determined how they desired to divide their property. Because the relationship was not one in which the attorney "was obligated to argue for one party that which he was obligated to defend for another", the attorney was permitted to advise the parties on tax consequences and to represent one of the parties in securing a no-fault divorce.

In a divorce mediation, the question is somewhat different from the usual dual representation because, in one sense, the mediator represents neither of the parties. Indeed, a New York State Bar opinion[18] outlawing dual representation referred to Ethical Consideration 5-20[19] which permits lawyers to mediate in matters involving former or present clients and stated in dicta: "a lawyer approached by husband and wife in a matrimonial matter and asked to represent both may, however, properly undertake to serve as a mediator or arbitrator."[20]

In one of the first ethics opinions on the subject, the Boston Bar Ethics Committee[21] considered the actions of a lawyer who proposed to offer services as a mediator to a married couple considering divorce and to draft a separation agreement and related documents setting forth agreed-upon terms arrived at in mediation. As mediator, the lawyer agreed to refrain from representing either of the parties in any proceeding between them. Although stating that it did not "enthusiastically endorse" mediation, the Boston Bar approved the mediation service so long as the attorney did not represent either party and the parties were advised of the possible conflict and of the various alternatives open to them (e.g. appearing pro se or obtaining separate representation). The Boston Bar opinion pointed to some of the drawbacks of an attorney serving as a mediator: unequal bargaining power where commitments are made without the benefit of the advice and assistance of counsel, concern by the clients about the mediator's possible bias in giving advice, and the reopening of negotiations if independent lawyers are later consulted. On the other hand, it chose to permit a lawyer to render mediation services for clients who wished to experiment since the committee found that the usual alternatives -- resort to the adversarial process and to pro se divorce -- had their own disadvantages.

The Oregon State Bar Association adopted the reasoning of the Boston Bar in an informal opinion[22] on the propriety of divorce mediation. Although the opinion was the result of an unauthorized practice investigation into the Portland-based Family Mediation Center, which used lawyer-therapist teams to mediate separation agreements, the opinion initially discussed the propriety of a solo lawyer mediator. Accepting the Boston Bar position, the Oregon Bar Committee emphasized that the lawyer did not represent either party. It also imposed four conditions that must be satisfied before mediation by an attorney is appropriate: The lawyer (1) must clearly inform the parties the (s)he represents neither and they must both consent; (2) can give legal advice only to both parties in the presence of each other, (3) can draft the proposed agreement but must advise and encourage the parties to seek independent legal counsel; (4) must not represent either or both parties in a later legal proceeding.

Disciplinary Rule 5-105, which requires a lawyer to decline employment if the interests of another client may impair the independent professional judgment of the lawyer,[23] has been relied upon by several bar ethics committees in ruling that it would be unethical for a lawyer to offer services as a divorce mediator. A 1980 Washington State Bar Committee[24] found that a lawyer who proposed to offer a mediation service to resolve property, custody, and support issues could not adequately represent the interests of each party as required by section (c) of Rule 5-105.[25] A 1981 opinion of the New Hampshire Ethics Committee[26] refused to approve a lawyer's proposal to provide mediation for husband and wife clients prior to either party filing for divorce. The New Hampshire Committee noted that clients seek the attorney precisely because (s)he is an attorney, and the expectations are that the attorney is practicing law, whether it be called mediation or not. Dismissing Ethical Consideration 5-20, which specifically authorizes an attorney to act as a mediator in certain circumstances, the New Hampshire Committee found that a lawyer could not remain "impartial" given the inherent conflicts involved in a divorce. Somewhat cryptically, the Committee also added that lawyer impartiality could not be maintained because "the future good will and patronage of one client will be of more interest to him than that of the other."[27] The New Hampshire Committee was also concerned that confidences of an individual party could not be withheld and might be used detrimentally, raising a possible Canon 4 violation,[28] and that potential long-range bitterness between the parties might be attributed to the mediator, giving at least the appearance of professional impropriety.[29] Finally, the Committee believed that the delivery of legal services to the public was not enhanced by mediation, since the parties would eventually need to retain separate attorneys following the mediation.

Some of the premises underlying the New Hampshire Committee's decision seem misplaced. There is no reason to assume that lawyers who seek alternative and more humane processes for divorcing couples have continued client patrongage as an objective. Nor is confidentiality a value that need be maintained at all costs, particularly when the process is no longer the traditionally adversarial one. On the other hand, concern about a lawyer's ability to maintain impartiality in the divorce context has been echoed by others. The Wisconsin State Bar Committee[30] refused to permit a lawyer to offer a mediation service, in which he proposed to educate the parties as to their legal rights, mediate disputes arising in the negotiations, draft a separation agreement for the parties, and process the divorce through the courts. The Wisconsin Committee found that the lawyer's responsibilities under the proposed arrangement went beyond those contemplated by Ethical Consideration 5-20.[31] And although the step of representing the parties in a divorce litigation seems outside the scope of a mediative role, the Wisconsin Committee did not limit its concern to whether or not the lawyer processed the divorce. The Committee thought that even the task of educating the parties about their legal rights was suspect because the lawyer would be perceived in the role of advice-giving and any "advice" would necessarily be contrary to the interests of one of the parties. Moreover, the Committee speculated that mediated agreements might not endure and that future litigation would result: "Neither the public's interest or the parties' is best served by the creation of future litigation."[32]

Both the Wisconsin and New Hampshire rulings appear to be rooted in an assumption that a lawyer cannot step out of the traditional role of legal advisor whose obligation is to pursue the best interest of his client, and that the public will perceive the lawyer only in that posture. Two other bar committees, in thoughtful, lengthy opinions, have explored that question in detail in attempting to ascertain whether a lawyer can function impartially in the divorce mediating setting.

The Maryland State Bar Association was asked to rule on the propriety of a lawyer's participation as an impartial advisory attorney in a "family mediation center."[33] The lawyer in this role is not the mediator, but the "impartial" legal advisor for the parties. In this capacity as well, the Maryland Bar detected Canon 5 difficulties for the lawyer. It referred to an earlier Maryland opinion where the Bar expressed the view that it was virtually impossible, given the wide range of potential disputes in a marital separation, for an attorney representing both husband and wife to come within the scope of Disciplinary Rule 5-105(c). That provision states that a lawyer can properly represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each. In the mediation context, the Maryland Bar felt that the parties' consent to mediation did not eliminate the conflicting interests upon which the lawyer would be required to offer an independent professional judgment. Indeed, the Maryland Bar suggested that at least one object of the clients' concern might be whether they have made intelligent and proper compromises during the mediation.

The Maryland opinion also indicated that the responsibility placed on the lawyer to draw up the settlement for the parties and the mediator was troublesome. It said:

> "If the preparation of a Property Settlement Agreement in mediation can be equated to filling in blanks on forms, then the services of an attorney are probably not necessary. If the preparation of such an Agreement requires the independent judgment of an attorney -- to choose what language best expresses the intent of the parties, to allocate the burdens of performance and the risks of non-performance, and to advise whether the Agreement as a whole promotes the best interests of both clients and not just some interests of one clients and some interests of the other -- then such preparation is likely to place the attorney in a position where he senses a conflict of interest. In any case, where such a conflict exists, the attorney must comply with the requirements of DR 5-105(c)."[34]

An inquiry to the Committee on Professional and Judicial Ethics of the New York City Bar Association[35] involved a mediation program undertaken by a non-profit mental health facility in which mental health professionals consulted with divorcing couples to work out various aspects of their separation or divorce, including economic and custody issues. In determining whether a lawyer could a) become part of the mediating team b) give impartial legal advice to the parties and c) draft an agreement for the parties once terms had been generally approved by the parties, the New York Committee addressed the question of a lawyer's nonadversarial role in dispute resolution. The Committee acknowledged competing policies reflected in the Code of Professional Responsibility and prior ethics rulings: that conflicts inherent in a matrimonial proceeding preclude a lawyer from "representing" both parties but that a lawyer may serve as an "impartial arbitrator or mediator." Resolving the tension was difficult, observed the Committee, because the Code did not explain what activities constituted mediation and what responsibilities a lawyer has when acting as a mediator. Like the New Hampshire and Wisconsin Committees, the New York panel recognized that parties might rely on the professional judgment of the lawyer to recognize the significance of legal issues and the impact on their individual interests, even when the lawyer-mediator disclaims a representative role. However, the Committee also indicated that in some situations a lawyer's professional judgment would not be called upon and (s)he could perform in a way that (s)he did not represent either party. Attempting to distinguish the two situations, the Committee imposed an initial condition on the participation of a lawyer in divorce mediation: a lawyer may not participate in the divorce mediation process where it appears that the issues between the parties are of such complexity or difficulty that the parties cannot prudently reach a resolution without the advice of separate and independent legal counsel.[36] In addition, the New York ruling established seven guidelines for lawyers participating in mediation: (1) the lawyer must clearly advise the parties that the mediating role was a limited one and that they should not look to the lawyer to protect individual intersts or to keep confidences from one another (2) the lawyer must clearly explain the risks of proceeding without separate counsel (3) lawyer mediation is limited to those activities permissible to lay mediators and must not require the exercise of professional legal judgment (4) impartial legal advice may be given and an agreement may be reduced to writing only when the lawyer outlines the pertinent considerations and consequences of choosing the agreed-upon resolution (5) legal advice may be given only to both parties in the presence of others (6) the lawyer must advise the parties of seeking independent legal counsel before executing any agreement (7) the lawyer may not represent either of the parties in a subsequent legal proceeding.[37]

In spelling out the responsibilities of a lawyer who acts in a mediating capacity, the New York Committee has helped to shape an alternative model for dispute resolution. Such clarification is critical for it is inevitable that lawyer-mediators will be exposed to charges of impropriety by unhappy clients. In Lange v. Marshall,[38] one of the first reported malpractice cases brought against a lawyer-mediator, the wife claimed that the mediated settlement was inadequate. She based her contention on the fact that she later sought independent legal counsel and obtained a more favorable settlement from her husband. The Missouri court ruled that even if the lawyer had been derelict in his responsibilities, the plaintiff could not show that she had suffered any damage since there was no proof that the husband would have settled the case without litigation at the higher figure. However, it is interesting to probe the basis of the plaintiff's charges. She argued that the lawyer-mediator failed to 1) inquire into the financial state of the husband and advise her 2) negotiate a better settlement for her 3) advise her that she would get a more favorable settlement if she litigated the matter and 4) fully and fairly advise her regarding her rights to marital property, maintenance, and custody. The lawyer conceded that he had not performed these tasks but maintained that they were not appropriate functions for a mediator. Although the court did not reach the question of the appropriate responsibilities of a lawyer-mediator in that it ruled that plaintiff suffered no damages in any event, the case emphasizes the need for more precise standards and guidance from the Bar in developing alternative dispute resolution processes.

KUTAK VIEW

The proposed American Bar Association Model Rules of Professional Conduct (Kutak Commission)[39] address the issue of the lawyer as intermediary, but leave an unfortunate gap in delineating the differences between mediation and representation. And nowhere in the rule or comments does the ABA recognize or endorse the variety of alternative dispute resolution mechanisms embraced in the concept of mediation.

Rule 2.2,[40] entitled Intermediary, prescribes the circumstances in which a lawyer acting as an intermediary meets ethical standards. Rule 2.2(a) sets forth the following conditions: (1) The lawyer must disclose to each client the implications of the common representation, including the advantages and risks involved, and must obtain each client's consent to the common representation; (2) the lawyer must reasonably believe that the matter can be resolved on terms compatible with the clients best interests, that each client can make informed decisions in the matter, and that there is little risk of prejudice to the interest of any client if the contemplated resolution is unsuccessful; and (3) the lawyer can act impartially and without improper effect on other responsibilities the lawyer has to any of the clients.[41] Rule 2.2(b) also requires the lawyer acting as intermediary to explain fully to each client the decisions to be made and the considerations relevant to making them;[42] and Rule 2.2(c) mandates that a lawyer shall withdraw from an intermediary role if any client so requests, if the conditions under section (a) cannot be met, or if in light of subsequent events the lawyer should reasonably know that a mutually advantageous resolution cannot be achieved.[43]

The Comment to Rule 2.2 states that a lawyer acts as an intermediary in seeking to establish or adjust a relationship between clients on an amicable and mutually advantageous basis.[44] Its list of examples includes "mediating a dispute between clients", but the other examples--helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest--are closer to a practice of "common" representation. This confusion in the new Code between "common representation" and "mediation", particularly divorce mediation, is troublesome because the lawyers' tasks in each are widely divergent.[45] Moreover, in describing situations where the risk of failure is so great that "intermediation is plainly impossible",[46] the commentary points to "clients between whom litigation is imminent or who contemplate contentious negotiations" and "where the relationship between the parties has already assumed definite antagonism."[47] These characterizations easily fit potential divorce mediations, and thus the Kutak Commission's failure to specifically address the subject is distressing. Curiously, commentary in earlier Kutak drafts specifically stated that "under some circumstances a lawyer may act as an intermediary between spouses in arranging the terms of an uncontested separation or divorce settlement,"[48] but that language was deleted in the final draft. In light of the continuing proliferation of mediation programs and conflicting state ethics committee rulings on the subject, a direct and specific response on the subject of divorce mediation should have been forthcoming from the framers of the new code of professional responsiblity.

Assuming that divorce mediators do fall within the "intermediary" rubric of the Kutak rule, its conception of the "intermediary" differs from that of other bar committees that have confronted the issue. The commentary states that a lawyer acts as intermediary under the Rule when the lawyer represents all parties.[49] In contrast, the Boston, Portland, and New York opinions characterized the lawyer-mediator as representing "neither of the parties," thus marking a clearer shift in the lawyer's role.

The difference between the Model Code's requirement of "representation of all parties" and the view that the lawyer "represents neither party" may be only a semantic one or may indicate that the ramifications of the concepts have not been fully explored. Alternatively, the different formulations may signify important assumptions about the role of the lawyer in mediation and about the tasks and responsibilities that may be undertaken. For example, the Maryland opinion suggested that unlike in a traditional representation, the attorney-client relationship did not necessarily exist in mediation and "while honesty would remain a fundamental duty of the lawyer regardless of the role, loyalty would not".[50] Likewise, the New York opinion indicated that clients in a mediation should not look to the lawyer-mediator to protect their individual interests. But if the lawyer can be said to "represent both parties," the obligation may be to act in a representative capacity toward both parties and move back and forth between the parties in an effort to protect the interests of each.

Additionally, if a lawyer "represents" the parties in mediation, it would seem to follow that the traditional tasks of the lawyer would appropriately be part of the mediation. The concept of representation would seem to include giving legal advice, drafting the separation agreement, and perhaps even filing the necessary papers to process the divorce through the courts. However, when the lawyer is said to "represent neither party", a different and more limited set of functions is suggested. Indeed, the New York opinion which presumes that the lawyer can give impartial legal advice and can draw up the separation agreement for the parties but not represent them in subsequent proceedings is a useful start in shaping the identity of the lawyer-mediator. Hopefully, interpretations under the new Code will also address these difficult questions.

OTHER VARIATIONS

Within the lawyer-mediator context, various adaptations to the model are possible, some of them alleviating in part the professional responsibility concerns. There is a hint in the Boston opinion that the lawyer-mediator might advise the parties to seek independent counsel, thus implying that the mediator emerges "in addition to" rather than "instead of" the lawyers. Obviously, such a practice provides the parties with maximum protection if the lawyers exercise truly independent judgment. On the other hand, invoking independent lawyers on each side might undermine negotiations and agreements that were reached with the mediator. Also, the mediator begins to look like an additional tier in the traditional adversarial process that merely increases the expense of divorce. Most importantly, some couples seek mediation as an alternative to the adversarial process which they envision as inevitably hostile.

Because the adversarial structure is not eliminated in this modification, it does not offer a real alternative.

A second adaptation might find mediators assisting the negotiations with the parties and their lawyers -- much like labor mediation -- but this process is likely to be time-consuming and expensive. If mediation is to be a practical option for divorcing middle-class couples, the mediator probably cannot be only an adjunct to the present adversarial practice.

II. THE SINGLE MENTAL HEALTH PROFESSIONAL MEDIATOR

The mental health professional, who serves as a divorce mediator, is technically not covered by the code of professional ethics. But in conducting the mediation, the mental health professional walks a tightrope between talking the couple through the issues and giving them legal advice. In the latter role, the sole non-lawyer mediator runs the risk of "engaging in the unauthorized practice of law," thus subjecting him(her)self to misdemeanor or contempt charges.[51] Enforcement of the unauthorized practice prohibition is usually initiated through a standing bar committee on unauthorized practice.[52]

It does, of course, seem clear that there has been and will continue to be a role for mental health professionals in the divorcing process. Many couples seek professional counseling, sometimes in an effort to cope more effectively with the marriage break-up. But these efforts of mental health professionals differ from those in divorce mediation, which contemplates the mediator assisting a couple in reaching an effective agreement, including a settlement of economic and custodial issues. It is hard to imagine that a mental health professional can effectively help the couple reach agreement without some understanding of and advice on the legal issues involved.

Whether a non-lawyer mediator should appropriately perform those tasks is a separate question. The policy behind the unauthorized practice prohibition is obviously protection of the public; there is concern that no matter how well a layman knows his or her specialty, the legal issues involved require legal experience. On the other hand, many of the legal issues that arise in divorce and separation are relatively straight-forward and one can imagine a well-trained group of mediators (in the manner of para-professionals) acquiring the necessary expertise.[53] In this context, the criticism that the "unauthorized practice" prohibition operates primarily for the benefit of lawyers rather than the public, by securing for lawyers a monopoly of certain "social" tasks, becomes relevant.

The primary issue in any unauthorized practice investigation is whether the "non-lawyer has engaged in activities properly constituting the practice of law." Little guidance emerges from case law decisions which restate tautologies and characterize as improper "...what is commonly understood to be the practice of law"[54] and "those acts, whether performed in court or in a law office, which lawyers have customarily carried on from day to day,through the centuries."[55]

As noted earlier, divorce mediation is inextricably tied to legal issues. At minimum a mediator would be shaping an agreement "in the shadow of the law"[56] and would eventually need to draw up an outline or memorandum of understanding. Whether the parties later draw up a formal agreement themselves or consult independent counsel, the propriety of the mediator's action and advice would still be in issue. Mental health professionals conducting mediation are likely to argue that any legal advice given or legal instruments prepared in mediation are only "incidental" to their profession and that therefore they fall outside the "unauthorized practice" prohibition.[57] Such an exception for "incidentals" has permitted title insurance companies to draft legal documents connected with conveyancing, real estate brokers to fill out form instruments for property transfers and accountants to give advice regarding tax issue. In any event, however, non-lawyers cannot lawfully charge for these "incidental" legal services and the incidental services cannot require the resolution of difficult or complex questions of law.[58]

KITS, FEW RULINGS

Case law and ethics opinions in this area are unilluminating. In an early 1962 opinion,[59] the Los Angeles County Bar suggested that a marital counseling organization might be engaged in the unauthorized practice of law. In ruling that an attorney could not accept employment with a family counseling service for the purpose of giving legal advice to the organization's clients, the Committee cautioned that marriage counselors who advised clients with reference to the laws relating to family relationships might be engaged in the unlawful practice of law. Similarly, a proposed association of an attorney with a firm of aviation consultants to offer services to owners and prospective owners of public airports was said to involve the lawyer in aiding the unauthorized practice of law.[60] And an attorney's participation in a firm offering financial planning services including tax and pension advice, to its clients, was held unethical.[61]

The unauthorized practice issue surfaced in analogous fashion a decade ago with the proliferation of lay divorce kits and divorce kit firms.[62] The need of divorcing couples for low-cost legal assistance prompted two approaches to lay divorce assistance. The first offered for sale a prepared kit containing forms, explanatory data for using the forms, and information concerning the relevant divorce law. The second approach provided not only forms but also personal services, including interviews and aid in completing documents and forms. The attacks on this type of lay legal assistance as the unauthorized practice, did not produce uniform results. In several states, the publication of divorce kits itself was considered to constitute the unauthorized practice of law,[63] but in other states so long as the publication did not establish a personal relationship of attorney and client, there was no unauthorized practice.[64] However, generally where lay counselors offered interviews, explanations, advice and other assistance to divorcing couples, the action was held to be the unauthorized practice of law.[65] In the wake of these developments numerous suggestions were made that lay divorce options should be preserved and that such activities were consistent with a specific legislative purpose expressed in various no-fault divorce laws.[66]

Although several lay divorce mediators have been confronted with unauthorized practice charges, there have been few formal opinions on the matter. The North Carolina

State Bar Unauthorized Practice of Law Committee[67] did rule that a non-profit organization conducting a divorce mediation service, which required participating couples to sign an agreement by which they agreed to abide by the rules of the organization and to submit unresolved disputes to binding arbitration, was engaging in the unauthorized practice of law. The preparation of the contract itself as well as warnings to the couple about its implications were held to be tasks that could be undertaken only by a attorney. The New York City Bar Committee,[68] in approving a mediation program undertaken by a non-profit mental health organization, held that it was beyond the Committee's jurisdiction to determine whether the activities of mental health professionals undertaking divorce mediation constituted the unauthorized practice of law, but assumed for the purposes of its opinion that it was "possible for laymen to perform certain divorce mediation activities without exercising professional legal judgments and without engaging in the unauthorized practice of law."[69]

The question of mental health professional mediation presents a stronger case for relaxation of the unauthorized practice restriction than did the earlier type of lay divorce assistance. Lay divorce kits and firms were providing no specialized service that drew upon lay individuals' talents and expertise; presumably the interest in this type of assistance was only an economic one in that routine tasks performed by non-lawyers would be less expensive than if undertaken by lawyers. Mediation, offered by skilled mental health professionals, is an alternative service and process; the imparting of legal information is only an incidental component of the larger task of helping the couple resolve their own differences on the issues surrounding the marriage dissolution. Yet the critical factor in the lay divorce kit cases related to the concern that erroneous or incomplete advice might be given to clients, and it is true that in approving mediation with a lawyer as mediator, the Boston Bar echoed the concern that the legal issues in divorce mediation should be within the lawyer's province: "If the parties are to be advised as to the legal aspects by a person not engaging in the improper practice of law, that advice must be given by an attorney."[70] However, given the option in mediation of the spouses each seeking independent counsel at a later time, it can be argued that mediation specialists can be sufficiently trained in legal matters to enable them to conduct an informed mediation. Undoubtedly, systematic training must be built into such programs and perhaps special licensing and regulation of marital mediators is in order. But if there are to be practical alternatives to traditional adversarial divorce

It will take innovative responses from the Bar, rather than automatic resort to charges of unauthorized practice.

III. THE LAWYER/THERAPIST INTERDISCIPLINARY TEAM

A solution to the concerns voiced about non-lawyer mediation is provided by this approach. A lawyer and mental health professional jointly participate in mediation with a divorcing couple.[71] Each professional brings particular expertise to the process: the mental health professional in dealing with the emotional elements which might be blocking an effective settlement, and the lawyer in apprising the parties of their legal rights and in drafting a separation agreement. As in all the models, the parties would be free to consult independent counsel following mediation, but realistically, it is unlikely that most couples would do so.

But professional responsibility difficulties also apparently arise herein. First, the lawyer functioning as a mediator in this model faces the same Canon 5 problem that the sole lawyer mediator has in model 1. Again, if the lawyer is not representng either party, as the Boston and Oregon opinions sug[illegible], it should be appropriate for him/her to render legal advice and draft the separation agreement.

However, the New York City Bar Committee expressed concern that a lawyer, working with mental health professionals in either a mediating or advisory attorney capacity, might be relied upon to recognize and protect the individual interests of the client. Thus, before participating in any mediation program, the lawyer must determine whether the parties can prudently reach a resolution without the advice of separate and independent legal counsel. Echoing similar concerns about the lawyer who acts as an "impartial advisory attorney" in a mediation program, the Maryland Bar pointed out that issues would surface as to how the agreement should be reached, who would make the concessions, and who would receive benefit from those concessions. The lawyer would be required to give both clients the full range of his advice, based upon legal, factual, practical, and even moral factors. The Maryland Bar feared that such a position might compromise the attorney:

> "Even in the most bitter divorce litigation, the parties can generally agree on their ultimate goal of wanting to be divorced. In mediation, as in litigation, the attorney is responsible to the clients not only for the end achieved, but also for the means by which the end is achieved. If it appears to be the attorney involved in mediation that one client is benefitting from the mediation while the other is being prejudiced, the attorney is placed in an untenable situation. He cannot advise the one client to terminate the mediation without adversely affecting the interests of the other. Despite this conflict, the attorney cannot keep silent without violating his obligation of loyalty."[72]

Assessing the conflict seems to depend upon whether one believes that a lawyer can act impartially in giving legal advice in the mediation context or whether a duty to protect the individual interest of each clients undermines a neutral role. Further clarificaiton of the lawyer's responsibilities in mediation will be necessary if a satisfactory solution to the conflict of interest dilemma is to be found.

UNHOLY ALLIANCES

A second professional responsibility issue is introduced in the lawyer-therapist joint mediation by Canon 3. Canon 3 provides that a lawyer should assist in preventing the unauthorized practice of law. Specifically, a lawyer cannot practice law in association with or in partnership with a non-lawyer, and cannot split fees with a non-lawyer or work for clients of a lay employer.[73] These provisions are designed to insure the loyalty of the lawyer to client without any question of possible conflicting interests of lay intermediaries, and to insure that legal services are rendered by those appropriately trained.[74] In a sense, it would be ironic if Canon 3 restrictions should impede the interdisciplinary team, since its very purpose is to cure the "unauthorized practice" potentiality that exists for the sole non-lawyer mediator. So long as the lawyer performs the "legal services" in mediation and the mental health professional uses his/her expertise to move the parties along, a reasonable interpretation of Canon 3 should permit experimentation with this model.

Several specific Canon 3 problems appear to surface. Ethical Consideration 3-8 states that "since a lawyer should not aid or encourage a layman to practice law, he should not practice law in association with a layman or otherwise share legal fees with a layman." Of course, as a "joint mediator," the lawyer may not be "practicing law" at all, and thus can avoid the prohibition. This argument relies on the fact that a lawyer mediator does not wear the hat of a "lawyer" when (s)he undertakes mediation service. Also, the text of Ethical Consideration 3-8 indicates that the provision was really designed to prevent associations that might lead to fee-splitting.[75] Where the services being performed are those of mediation -- and if it is proper for a lawyer to step into the role of mediator -- then this concern should disappear. Disciplinary Rule 3-102 expressly prohibits lawyers from dividing fees with non-lawyers.[76] However, in the opinion of the Oregon Bar,[77] which was asked to rule on the propriety of a Family Mediation Center made up of four attorneys and four counselors, no fee-splitting violation was found. A $60 per hour mediation fee was charged, with $25 allocated to the attorney and counselor and $10 to an overhead fund. In alluding to the Canon 3 problem, the Oregon opinion held:

> "There seems little question but that fees are split between the attorney and counselor who comprise a mediation team. However, there is no general pooling of fees for division by percentage. The actual mediators simply each take a specific amount from the hourly fee for the particular case in which they participated. In a strict sense the counselor is not sharing in the direct fruits of the attorney's work, but is being compensated for his own labor, and vice versa. On the surface, however, it looks like fee splitting and tends to cause confusion about who is responsible for the legal product. The procedure whereby the attorneys and counselors bill separately for their time helps distinguish between the two professional roles and removes our concern about fee splitting."[78]

Another specific restriction is that of Disciplinary Rule 3-103, which states that "a lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law." In response to an inquiry whether an attorney could participate in a Family Mediation Center partnership or corporation, the Oregon Bar stated:

> "There is ... concern about how the public is going to distinguish legal and counseling functions and final responsibility for the legal product. DR 3-303 clearly prohibits an attorney from forming a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law. We find no recognized exception to this rule."[79]

Again in this context it is possible to argue that the activities of an interdisciplinary team are not the "practice of law" within the meaning of the prohibition. But, providing legal advice and drawing up a separation agreement -- all tasks which might fall within a joint mediation scheme -- do traditionally constitute the practice of law. Nonetheless, the committee's concern about the formation of a partnership or corporation was motivated by the fact that the public might be confused as to who has responsibility for the consequences of the legal advice and agreement when the services of a mediation were utilized. Thus, although the Oregon opinion did seem to prohibit the lawyers and therapists from forming a partnership and required any corporation that was formed to be one "solely of attorneys who could utilize the independent services of a counselor,"[80] it nonetheless approved generally of interdisciplinary mediation when the services were identified and appropriately attributed to the respective parties. In that vein, the Oregon Committee specifically referred to Ethical Consideration 2-11,[81] calling attention to the restriction on the use of a trade name, which can "mislead non-lawyers concerning the identity, responsibility, and status of those practicing thereunder.[82] These various policy concerns should indicate that if the tasks of the interdisciplinary mediation team are specifically designated and clients separately billed for services, Cannon 3 should not be interpreted as an obstacle to interdisciplinary mediation.

One further difficulty confronts mediation centers that use lawyers in addition to non-lawyers marital mediators. The prohibition against associating with laymen extends to a lawyer employed by a lay agency. The concern is that a lay agency should not control or exploit the professional services of the lawyer. Disciplinary Rule 2-103(D)[83] places restrictions on a lawyer's ability to service an organization's clients, except in the legal aid context or when the lawyer is employed by a non-profit organization to provide services for its members under certain conditions. A general qualification in DR 2-103(D) is that in any such affiliation there must be "no interference with the exercise of independent professional judgment in behalf of the client." This concern that a lawyer's advice not be filtered through lay intermediaries was more specifically enunciated in old Cannon 35 which in part stated: "The professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer. A lawyer's responsibilities and qualifications are individual. He should avoid all

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relations which direct the performance of his duties by or in the interest of such intermediary. A lawyer's relation to his client should be personal, and the responsiblity should be direct to the client. Charitable societies rendering aid to the indigents are not deemed such intermediaries . . ."[84]

Under old Canon 35, the Committee on Legal Ethics of the Los Angeles County Bar Association[85] ruled that it was improper for a lawyer to accept employment by a marriage counseling service for the purpose of giving professional advice directly or through counselors to the clients of the organization. Likewise, a number of opinions have held that an attorney cannot accept employment with an accounting firm for the purpose of rendering legal services to its clients.[86]

The issue of lay intermediaries -- though perhaps relevant in a mediation plan using impartial advisory attorneys (see Example IV)[87] -- should be less troublesome in the context of interdisciplinary mediation. Arguably, the limitations on a lawyer's association with non-lawyers ought not to be applicable when the lawyer is acting as mediator and thus not "practicing law." It could ~~even~~ be argued that even if the mediator does undertake services, such as drawing up the separation agreement for the parties, the lawyer's principal function is that of mediator and not of advocate of any party's interest. If questions as to protection of a party's interest arise during mediation, then perhaps referral to an attorney of the party's choice would be in order.

A lawyer-therapist joint mediation approach is an attractive one, in that it combines the talents of skilled professionals to tackle both the emotional and the legal issues that arise during divorce settlements. Recognizing that fact, the Oregon Bar suggested a mediation program offered through a corporation made up solely to attorneys who would then utilize the "independent services of a counselor" when needed. If such a service is desirable, it would be a severe restriction if professional ethics were thought to allow only this form. Perhaps other adaptations can also be ethically proper, so long as the public is aware of what services are being rendered in mediation and what options are available if a party's interests are threatened. Certainly it would seem that a lawyer-mental health professional team should be able to offer mediation services if the parties choose the process and if they are advised that they can seek independent legal counsel during or after mediation.

IV. THE COOGLER MODEL

The best-known and developed form of mediation is the "structured mediation" model designed by O.J. Coogler.[88] Like the interdisciplinary team approach, it uses the talents of specialized family mediators as well as matrimonial attorneys. However, the task of each is more independently delineated than in the previous model. With the Coogler approach, the marital mediator, usually a family counselor educated in a behavioral science, will have undergone special training in the mediation of family disputes. A set of private law rules, largely derived from recent divorce and marital property laws, provide the substantive borders within which the mediation takes place. Other rules require that a mediator concur or nonconcur in any agreement reached, and that if an impasse results the couple submit the dispute to arbitration. While a formal rule structure characterizes "structured mediation," it is the concept of the "impartial advisory attorney" that is central to the Coogler design. Once the couple has substantially agreed upon all the relevant issues in mediation, a single attorney is brought in to answer any legal questions that have been raised, to "finalize" the tentative agreement that has been reached and to draft the formal settlement agreement. The attorney is selected from a panel of impartial advisory attorneys provided by the mediation center. Panel members are chosen on the basis of a substantial reputation in domestic relations and completion of a mediation orientation program.

Some of the professional responsibility issues raised here are the same ones noted earlier. For example, if the non-lawyer mediator undertakes to give legal advice in the absence of the advisory attorney, (s)he may be engaged in the unauthorized practice of law. But here unlike the single lay mediator approach, the presence of an impartial advisory attorney at the later stages of mediation mitigates any danger of inaccurate or misleading information. Because all matters which require the exercise of legal judgment are the responsibility of the advisory attorney, "any preliminary directions taken at the suggestion of the mediator are subject to final approval by an attorney before either party is allowed to act upon or be bound by them."[89]

A recent ruling by the Maryland State Bar Association,[90] addressed to other issues in the Coogler-design mediation program, did note that it was possible for a mediator or family mediation center to engage in the unauthorized practice of law by "applying general legal principles to the specific problems" of clients. Though leaving the resolution of that question to the Attorney General, the opinion also stated that "a trained mediator should, of course, be aware of what constitutes the practice of law and carefully avoid overstepping his bounds, in his eagerness to conduct a successful mediation even if pressed by a client."[91] The Maryland opinion also found it beyond the scope of Committee jurisdiction to determine whether mediators interpreting and applying a body of "private law" imposed by the mediation rules constituted the practice of law.

MARYLAND'S WARNING; NEW YORK'S GUIDELINES

The Maryland Bar noted that impartial advisory attorneys in such a system could violate Disciplinary Rule 3-101(A) by aiding non-lawyers in unauthorized practice. The Bar cautioned lawyers from serving as an "impartial advisory attorney" if the center or mediator was engaging in the unauthorized practice of law, adding that a lawyer would not necessarily be precluded from serving as a panel attorney if the unauthorized practice was not systematic but only detectable on a case-by-case basis. More particularly, the impartial advisory attorney, like the lawyer who mediates jointly with the therapist, could run afoul of Ethical Consideration 3-8, prohibiting lawyers from practicing law in associtcion with a layman or otherwise sharing legal fees with a layman. In the Coogler system, the impartial advisory attorney does not actually mediate. Therefore, it might be said that such an attorney, unlike the attorney who directly mediates, is more traditionally engaged in the practice of law. On the other hand, the impartial advisory attorney can hardly be said to be "practicing law in association with a layman" since the lawyer maintains professional independence and merely takes referrals from the mediation center as a member of an attorney panel.

Other difficulties confront a lawyer serving as an impartial advisory attorney. The Canon 5 prohibition against representation of persons with conflicting or potentially differing interests may be applicable to the panel attorney. The Minnesota State Bar Association[92] has apparently refused to sanction impartial advisory attorneys for this reason. The Virginia State Bar[93] stated that an impartial advisory attorney would have an obligation under Disciplinary Rule 5-105 to disclose to the couple the conflict that exists in advising both husband and wife and that in any event, a panel attorney who rendered advice on the consequence of a settlement agreement could not represent either party against the other in a subsequent divorce action.

The recent Maryland State Bar Association opinion[94] also addressed the Canon 5 difficulties at length. Even though the parties have consented to mediation, the Bar Committee observed that the conflicting interests were not eliminated since the object of the clients' concerns would be whether each client has made intelligent and proper compromises during mediation. It also noted that an attorney could not blindly take a referral from a lay mediator and fail to make an independent determination of the interests of the parties, and then "mechanically recite a litany of legal rights and obligations of the parties topped off with a written separation agreement."[95]

The responsibility of the impartial advisory attorney under Coogler's mediation rules to prepare a separation agreement for both parties and to explain full and impartially its terms to each party in the presence of the other and the mediator raises other problems. The Maryland Bar dismissed the ideas that the attorney was a mere scrivener or secretary and was only "putting the agreement into legal language;" it stated: "An attorney's conduct in drafting such an agreement cannot be considered separately as more neutral than his or her representation of the parties whose opposing interests are buried in the compromises which make up the agreement."[96]

Despite its cautionary tone, the Maryland opinion seemed to accept the concept of an advisory attorney during mediation. Like the Virginia opinion, it held that Disciplinary Rule 5-105(c) and Ethical Consideration 5-20, may prevent the impartial attorney from representing either of the parties in any subsequent divorce litigation. Ethical

Consideration 5-20 specifically states that "after a lawyer has undertaken to act as an impartial arbitrator or mediator, he should not thereafter represent in the dispute any of the parties involved." The Maryland opinion also called attention to the fact that a subsequent challenge to the separation agreement might require the advisory attorney to give testimony in the case, and that under Disciplinary Rule 5-102,[97] it is appropriate for a lawyer to withdraw from a case when "a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client."

The use of formal mediation rules in the Coogler method presents independent difficulties. For example, one rule provides that if the parties cannot agree on an impartial advisory attorney, the mediation center will select the attorney. The Maryland State Bar opined that no attorney-client relationship could develop in the absence of a client's consent and that any attorney chosen in this manner would be powerless to act as lawyer for the couple. They found the procedure "unworkable under either the proposed Rules of Conduct or the exising Code of Professional Responsibility."[98]

To the extent that a particular "brand" of mediation encourages the attorney to impartially represent the entire family unit -- wife, husband, and children -- and/or suggests to the lawyer that a concern for the best interests of the children should be paramount, the Maryland Bar expressed the view that an attorney could be acting unethically:

> "A lawyer's concern for the children of the client cannot excuse disloyalty to that client and, whether the question arises in the context of mediation or independent representation, the lawyer must always weigh his conduct against the standards set out in the Code of Professional Responsibility. Since a family, unlike a Corporation, has no legal status and cannot as an entity retain a lawyer, we must reject the notion that the attorney in mediation represents the family and not the individuals who make up the family. Moreover, in any case where divorce was contemplated the lawyer would by definition, have to find the interests of the individuals inimical to those of the family and completely refrain from advising the individuals."[99]

Addressing the more traditional conflict of interest concerns it perceived in a mediation-program variant of the Coogler model in which lawyers intervened in a mediation at several points to provide "legal direction", the New York City Bar[100] focused on the question of the clients' informed consent. Only if there were assurances that the couple understood the risks involved was the Committee willing to lend its imprimatur to mediation. To that end, the Committee set forth guidelines requiring the lawyer to advise the parties of his/her role, to caution them not to look to the lawyer to protect individual interests or keep confidences, and to impress upon them the advantage of seeking independent legal counsel before executing any agreement.[101] Additionally, the Bar Committee imposed on the lawyer the responsibility of making an independent judgment that the issues involved were not so complex or difficult that it would be inappropriate for the parties to proceed without separate legal counsel.[102]

If the above conditions are satisfied, the New York Committee authorized lawyers to participate in a non-profit mental health organizations' mediation program so long as the exercise of professional legal judgment was not required; the lawyer is permitted to give impartial legal advice to a couple, provided that it is in the presence of both parties and fully explores the pertinent considerations and alternatives with each party. Additionally, the lawyer is precluded from representing either of the parties in any subsequent legal proceedings relating to the divorce.

In general, the conflict of interest problems confronting the impartial advisory attorney ought to be viewed much like those of the solo lawyer mediator. Given the liberal interpretations of the Boston, Oregon, and New York City Bar Committees on lawyer mediation, it would seem the advisory attorney can be viewed as distinct from a lawyer who represents both parties. Certain limitations can be imposed, such as restricting an impartial advisory attorney from later representing either of the parties in the divorce litigation, and eliminating any rules which seem to impair the independent professional judgment of the lawyer. But the impartial advisory attorney role is one that is important if alternatives to traditional adversarial divorce are to be forthcoming, and appropriate safeguards should be devised to make that option viable.

SOLICITATION, CONTROL ISSUES

One troublesome issue in "structured mediation" is the panel-referral scheme itself. The Code of Professional Responsibility, Disciplinary Rule 2-103[103] forbids lawyers to solicit employment, or request or permit a person or organization to recommend or promote the use of lawyer's services. This prohibition is waived, however, if the organization falls with one of the exceptions designated in Disciplinary Rule 2-103(D). Disciplinary Rule 2-103(D)(4), adopted in response to the Supreme Court decision in United Mine Workers v. Illinois State Bar Association,[104] Brotherhood of Railroad Trainmen v. Virginia[105], and NAACP v. Button,[106] permits bona fide organizations to recommend legal services to their members or beneficiaries if certain conditions are met. Those conditions state that the organization cannot derive profit from the rendition of legal services,[107] and that the lawyer must not have initiated or promoted the organization for the primary purpose of providing personal financial benefit.[108] Also, the organization must not operate for the purpose of procuring legal work or benefit for the lawyer as a private practitioner outside of the organization's program,[109] the member or beneficiary must be the lawyer's client, not the organization's,[110] and the member or beneficiary must be free to bring in an independent lawyer when and if he or she chooses.[111] Finally, the organization must file an annual report with the appropriate disciplinary authority explaining the legal service plan.[112]

As noted earlier, DR 2-103(D)(4) was a response to the Supreme Court cases that held that organizations like unions and the NAACP must be permitted to provide or recommend legal representation for their members or beneficiaries.[113] Those decisions are based on First Amendment expression and association rights of the members.[114] Indeed, in some state versions of the Professional Code of Responsibility, referrals under DR 2-103(D)(4) are authorized only from not-for-profit organizations which "furnish without charge legal services as a form of political or associational expression."[115]

It might be possible to argue that not-for-profit mediation centers are within the DR 2-103(D)(4) exception by characterizing the divorcing couples as members or beneficiaries of an appropriate organization. However, it is more likely that the restrictions of DR 2-103 should not even be applicable to mediation programs. The rule clearly was not designed with divorce mediation in mind, and efforts to fit mediation programs under its rubric just do not work.

Thus recent informal ethics opinions from Virginia[116] have caused confusion about the rule and its application to mediation. The Virginia State Bar committee concluded that the attorney's participation in a Coogler-type mediation program was acceptable, as long as the attorney's participation "remained within the confines of DR 2-103, which prohibits solicitation of employment."[117] Then, in a latter clarification,[118] the Committee indicated that it did not believe that a mediation center fell within any of the referral exceptions to DR 2-103(D) -- thus making improper an attorney's consent to employment through the clinic.

The New York City Bar,[119] in considering a variant of the Coogler model in which attorneys participated in a mediation program of a non-profit mental health organization, addressed the question of lawyer involvement in light of DR 2-103(D)(4). The Committee viewed the principal issue as whether the divorce mediation program involved an organization that "recommends, furnishes or pays for legal services to its members or beneficiaries." Conceding that couples to whom mediation was offered were not "members" of the program, the Committee concluded that they did come within the scope of "beneficiaries" under the rule. Because the divorce mediation program offered professional guidance to couples seeking divorce, such couples could be considered "beneficiaries" of the program.[120]

Additionally, the Committee noted that certain conditions listed in DR 2-103(D)(4) were drafted with an eye to prepaid legal insurance plans, and that divorce mediation programs might not be able to meet such conditions. Because it did not consider DR 2-103(D)(4) to be limited to prepaid insurance plans, the Committee held that "failure to meet conditions peculiar to such plans is not fatal to the program, provided the other conditions are met."[121] The Committee then summarized the rules under which non-profit divorce mediation programs utilizing lawyers must operate: (1) the organization must derive no profit from the legal services; (2) a lawyer must not promote the program for the primary purpose of providing financial benefit to the lawyer and the purpose of the program must not be one of financial benefit for lawyers; (3) the individuals seeking guidance--and not the program--must be recognized as the object of the lawyer's concern: and (4) the lawyer must not be aware of any violation of law by the mediation program or of any failure by the organization to file a report with respect to its legal service plan. The Committee viewed the condition of allowing beneficiaries to select counsel other than those furnished by the program as inapplicable to the divorce mediation situation.

Another escape from DR 2-103 which might be interpreted to limit referrals to an advisory attorney is DR-103(D)(3)[122] which permits referrals by a lawyer referral service operated, sponsored, or approved by a bar association. In the long-run, the bar's express approval of mediation services and referral systems might be ideal. But while mediation programs are still in the experimental state, this option is unlikely. In light of the Supreme Court's dismantling of other types of anti-soliciation rules in Bates v. United States[123] and In re Primus,[124] DR 2-103 ought to be construed as inapposite to the mediation situation, and, if guidelines for mediation programs are in order, specific rules should be adopted by the codes of professional responsibility.

Unfortunately, the Kutak Commission's proposed new rules on lawyer solicitation[125] were addressed to the more traditional problem of protecting attorneys affiliated with a group formed for the "purpose of furthering a group right or interest."[126] Thus the new rules shed little light on the treatment to be afforded lawyers participating in mediation programs.

If there is a legitimate concern emanating from DR 2-103(D), it might be its threshold requirement that there be no interference with the exercise of the attorney's independent professional judgment on behalf of the client. Indeed, the Kutak Commission's comment to its proposed rule on lawyer's affiliations with non-lawyers[127] expressed the view that the Code's focus in this context on authorized practice and potential soliciation has been misplaced: "'The significant issue in this area appears to be the impact that an intermediary arrangement would have on a lawyer-client relationship and the delivery of legal services . . . .'"[128] The Maryland State Bar Ethics Committee emphasized the importance of the attorney retaining an independent judgment and not just rubber-stamping an agreement arrived at by non-lawyer mediators: "The lawyer cannot be influenced by the desire of the Institute or Center to see that the mediation process is prosecuted to fulfillment if he believes that the mediation process is working against the interests of one, or both of the clients."[129]

Disciplinary Rule 5-107(B)[130] does prohibit a lawyer from permitting a person who recommends, employs or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services. Lawyers participating in mediation projects must be conscious of the sensitive nature of their role, but it can argued that bar legal ethics committees might better serve the public by permitting experimentation within reasonable limits and with appropriate safeguards.

Although the compelling interest of the states in regulating the legal profession through adoption of an ethics code has continued to be recognized, inroads have been made on any claim of unbridled power. The past two decades have seen provisions of such ethics codes challenged on constitutional[131] and antitrust grounds.[132] Anti-solicitation rules have been struck down in the name of First Amendment values[133] and minimum fee schedules have been found to violate the anti-trust laws.[134] Similar questions are raised by ethical restraints on mediative modes of divorce resolution. Wooden or overdefensive responses by bar committees or state courts to the novel ethical issues raised by divorce mediation will not serve the values of free choice which have been recognized in those recent decisions.

FOOTNOTES

1. *See generally* O.J. Coogler, Structured Mediation in Divorce Settlement (1978); J. Haynes, Divorce Mediation (1981), Spencer & Zammitt, Mediation-Arbitration: A Proposal for Private Resolution of Disputes Between Divorced or Separated Parents, 1976 Duke L.J. 911 (1976); Winks, Divorce Mediation: A Nonadversary Procedure for the No-Fault Divorce, 19 J. Fam. Law 615 (1980-81); Note, Non-Judicial Resolution of Custody and Visitation Disputes, 12 U. Cal. D.L. Rev. 582 (1979).

2. *See* Gaughan, Taking A Fresh Look at Divorce Mediation, 17 Trial 39 (April 1981); Haynes, Divorce Mediator: A New Role, J. Soc. Work 5 (Jan. 1978); Pearson, Child Custody: Why Not Let the Parents Decide?, 20 Judges J. 5 (1981); Pickrell & Bendheim, Family Disputes Mediation -- A New Service for Lawyers and Their Clients, 15 Ariz. B.J. 33 (1979). *See generally*, Fuller, Mediation -- Its Forms and Functions, 44 So. Cal. L. Rev. 305 (1963).

3. *See* Coogler, Weber & McKenry, Divorce Mediation: A Means of Facilitating Divorce Adjustment, 28 Fam. Coordinator 255 (1979); Pearson, *supra* note 2, at 6; Note, Non-Judicial Resolution of Custody and Visitation Disputes, *supra* note 1, at 584-91 (1979). For discussion of the negative effects that the traditional adversary divorce has had on the family, *see* J. Wallerstein & J. Kelly, Surviving the Breakup (1980).

4. See Druckman & Rhodes, Family Impact Analysis: Application to Child Custody Determination, 26 Fam. Coordinator 451, 456-57 (1977); Pearson, supra note 2, at 10. Note, Non-Judicial Resolution of Custody and Visitation Disputes, supra note 1, at 593-97 (1979).

5. See Fiske, Divorce Mediation As a Less Painful Path, 8 Mass. Lawy. Weekly (1979); Harris, Divorce's Friendly Persuaders, Money 85 (April 1980); Haskett, Arbitration Ends the Torture of Divorce, Moneysworth 16 (Jan. 1981); Pearson, supra note 2, at 10.

6. Interesting data appears in Bahr, Divorce Mediation: An Evaluation of an Alternative Divorce Policy (Bush Institute for Child and Family Policy, University of North Carolina at Chapel Hill (1980); Bahr, Mediation is the Answer, 3 Fam. Adv. 32 (Spring 1981); Kressel, Jaffee, Tuchman, Watson, and Deutsch, A Typology of Divorcing Couples: Implications for Mediation and the Divorce Process, 19 Fam. Process 101 (1980); Pearson, supra note 2, at 8-10; Pearson and Thoennes, Mediation and Divorce, The Benefits Outweigh the Costs, 4 Fam. Adv. 26 (1982).

7. Some of the difficulties are noted in Crouch, Mediation and Divorce: The Dark Side is Still Unexplored, 4 Fam. Adv. 27 (1982). Others argue that what is needed is a rethinking of the lawyering role. See Coogler, Changing the Lawyer's Role in Matrimonial Practice, 15 Conc. Cts. Rev. 1 (1977).

8. Court-supervised or court-referred mediation has been undertaken in several states. See, e.g.Family Conciliation Unit, Ft. Lauderdale, Fla; Probate and Family Court (Norfolk and Middlesex County), Massachusetts; Domestic Relations Division, St. Paul Minnesota; Family Court Counseling Service, Dane County, Wisconsin In California, mediation of custody issues has become a mandatory part of the divorce process. See Jenkins, Divorce California Style, 9 Student Lawy. 3 (1981).

Court-approved mediation usually operates within the traditional context where clients are represented by their lawyers. The ethical issues involved in private mediation thus do not usually arise in this type of mediation.

9. The Code of Professional Responsibility consists of Canons, Ethical Considerations, and Disciplinary Rules. The Canons, nine in number, are statements of "axiomatic norms," expressed in general terms. The Ethical Considerations are "aspirational in character: and constitutes a body of principles upon which the lawyer relies for guidance. The Disciplinary Rules are mandatory in character and disciplinary action can be taken for violation of such a rule. Preliminary Statement, Code of Professional

Responsibility.

Canon 5 states: "A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client." Ethical Consideration 5-1 reads: "The professional judgment of a lawyer should be exercised, within the bounds of law, solely for the benefit of his client and free of compromising influences and loyalties." All references are to the American Bar Foundation, Annotated Code of Professional Responsibility (1979).

10. Ethical Consideration 5-15 provides, in part, that "there are many instances in which a lawyer may properly serve multiple clients having potentially differing interests in matters not involving litigation."

11. Ethical Consideration 5-16

12. See Bedford, Possible Effect on Conflict of Interests in a Divorce Action Arising From One Attorney Framing the Decree, 15 Ala. L. Rev. 502 (1963); ABA Comm. on Professional Ethics, Opinions, No. 58 (1931); Mich. S.B.A. Comm. on Professional Ethics, 38 Mich. S.B.J. 112 (Opinion 85, January, 1945); N.Y. Cty. Lawy. A. Comm. on Professional

Opinions, No. 265 (1928); W. Va. S.B.A. Comm. on Legal Ethics, Opinions, Case 1169 (April 13, 1963). These state bar ethics opinions have been digested in Maru & Clough, Digest of Bar Association Ethics Opinions (1970); Maru, 1970 Supplement to the Digest of Bar Association Ethics Opinions (1972); Maru, 1975 Supplement to the Digest of Bar Ethics Opinions (1977).

13. O.S.B.A. Ethics Comm., O.S.B.A. Report 780, 783-84 (Opinion 30, May 1975); "... of course you can't represent both parties. The most you can do for agreed spouses is to be scrivener in the separation agreement process."

14. Ariz. S.B.A. Comm. On Legal Ethics, Opinions, No 76-25 (November 25, 1976), stating that in exceptional cases, dual representation is not improper, and approving the practice of the lawyer for one spouse filing for both if the second party is appearing in propria persona or has no other counsel. See also Coogler, Changing the Lawyer's Role in Matrimonial Practice, 15 Conc. Cts. Rev. (1977).

15. Klemm v. Superior Court of Fresno County, 75 Cal. App. 3d 893, 142 Cal. Rptr. 509 (1977).

16. Id. at 901, 142 Cal. Rptr. at 514.

17. Va. S.B.A. Comm. on Legal Ethics, Informal Opinions, No. 296 (1977).

18. N.Y.S.B.A. Comm. on Professional Ethics, 45 N.Y.S.B.J. 556, 557 (Opinion 258, September 15, 1972). The same view was adopted by the West Virginia State Bar Association in Legal Ethics Opinion 77-7 in Fall, 1977. See also Gibson, ABA Canon 5 Professional Judgment, 48 Tex. L. Rev. 351 (1970).

19. Ethical Consideration 5-20 provides: A lawyer is often asked to serve as an impartial arbitrator or mediator in matters which involve present or former clients. He may serve in either capacity if he first discloses such present or former relationships. After a lawyer has undertaken to act as an impartial arbitrator or mediator, he should not thereafter represent in the dispute any of the parties involved.

20. N.Y.S.B.A. Comm. on Professional Ethics, 45 N.Y.S.B.J. 556, 557, Opinion 258 (September 15, 1972).

21. Bost. B.A. Comm. on Ethics, Opinions No. 78-1 (1978).

22. Oregon, B.A. Comm. On Legal Ethics, Proposed Opinion, No. 70-46 (April 2, 1980).

23. DR 5-105 (A) and (B) state that it is improper for a lawyer to engage in representation if the lawyer's "independent professional judgment ... will be or is likely to be adversely affected" or if representation is "likely" to involve representation of interests that will adversely affect the lawyer's "judgment" or loyalty to a client.

24. Wash. S.B.A. Code of Prof. Resp. Comm., Informal Opinions, Item 385 (Feg. 20, 1980).

25. DR 5-105 (c) provides:

> In the situations covered by DR 5-105 (A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after such

disclosure of the possible effect of such representation on the exercise of this independent professional judgment on behalf of each. These problems are explored further in Note, Family Law -- Attorney Mediation of Marital Disputes and Conflict of Interest Considerations, 60 N. Car. L. Rev. 171 (1981).

26. N.H. S.B.A. Ethics Comm. (April 27, 1981) (Draft opinion.)

27. Id.

28. Canon 4 provides: "A Lawyer Should Preserve the Confidences and Secrets of a Client."

29. N.H. S.B.A. Ethics Comm. (April 21, 1981) (Proposed Opinion.)

30. Wis. S.B.A. Comm. on Professional Ethics, Opinions E-79-2 (Jan. 1980).

31. Id.

32. Id.

33. Md. S.B.A. Comm. on Ethics, No. 80-55A (August 20, 1980).

34. *Id.* at 8-9.

35. N.Y.C.B.A. Comm. on Professional and Judicial Ethics, No. 80-23 (Feb. 27, 1981).

36. *Id.* at 11.

37. *Id.* at 11-12.

38. 7 Fam. L. Rptr. 2583 (Mo.Ct. App. 1981).

39. *See* American Bar Association Commission on Evaluation of Professional Standards, Proposed Final Draft, Model Rules of Professional Conduct, (May 30, 1981).

40. *Id.* at 112-113. An alternative draft by the American Bar Association Commission on Evaluation of Professional Standards presents the recommendations in the format of the current Professional Responsibility Code. In the Alternative Draft, the provision on the lawyer as intermediary appears as Disciplinary Rule 5-105. *See* American Bar Association Commission on Evaluation of Professional Standards, Alternative Draft, Model Rules of Professional

Conduct (May 30, 1981).

41. American Bar Association Commission on Evaluation of Professional Standards, Proposed Final Draft, Model Rules of Professional Conduct (May 30, 1981) at 112.

42. Id.

43. Id. at 112-13.

44. Id. at 113.

45. Part of the difficulty lies in defining the role and activities of the mediator. On the one hand, the mediator might be in the position of giving neutral advice -- "representing the situation" rather then either of the parties. Alternatively, the lawyer might be the spokesman for the position of each of the parties. See Hazard, Ethics in the Practice of Law 58-68 (1978). Nonetheless, it seems clear that such these tasks are substantially different from the situation where a lawyer represents parties with common, yet potentially conflicting interests.

46. American Bar Association Commission on Evaluation of Professional Standards, Proposed Final Draft, Model

Rules of Professional Conduct, Comment, (May 30, 1981), at 113.

47. Id.

48. American Bar Association Commission on Evaluation of Professional Standards, Discussion Draft, Rule 5.1 (January 30, 1980), at 94.

49. American Bar Association Commission on Evaluation of Professional Standards, Proposed Final Draft, Model Rules of Professional Conduct, Comment (May 30, 1981), at 113.

50. Md. S.B.A. Comm. on Ethics, Opinions, No. 80-55A (August 20, 1980), at 6.

51. Statutes regulating the practice of law exist in all jurisdictions, and most states have statutes prohibiting the unauthorized practice of law. See Fisher and Lachman. The Unauthorized Practice Handbook 2 (1972). In the matrimonial law area, the unauthorized practice question had arisen frequently in the context of "do-it-yourself" divorce kits. See Project, The Unauthorized Practice of

Law and Pro Se Divorce: An Empirical Analysis, 86 Yale L.J. 104 (1976); Note, Lay Divorce Firms and the Unauthorized Practice of Law, 6 U. of Mich. J.L. Ref. 423 (1973).

52. Most state bar associations have a standing committee on the unauthorized practice of law. The committee has responsibility for investigating and bringing to the court's attention instances of the unauthorized practice of law by laymen. With repect to do-it-yourself divorce kits, see, e.g., Florida Bar v. Stupica, 300 So.2d 683 (Florida 1974); Oregon Bar v. Gilchrist, 272 Or. 551, 538 P.2d 913 (1975).

53. The use of paralegals for the performance of simple legal tasks has been sanctioned by the bar. See ABA Comm. on Prof. Resp., Opinions, No. 316 (Jan. 18, 1967). See also Ethical Consideration 3-6, approving delegation to lay persons "if the lawyer maintains a direct relationship with his client, supervises the delegated work, and has complete professional responsibility for the work product." Training criteria for paraprofessionals have been suggested by the bar. See A.B.A. Special Committee on Legal Assistants, Proposed Curriculum for Training of Law Office Personnel 9-19 (1971). See generally Brickman, Expansion of the

Lawyering Process Through a New Delivery System: The Emergence and State of Legal Paraprofessionalism, 71 Colum. L. Rev. 1153, 1169-1255 (1971). Presently, marital mediation services often have their own training programs and requirements. See O.J. Coogler, Structured Mediation in Divorce Settlement, supra note 1 at 75. It would be possible, of course, to encourage participation by the bar in delineating tasks, establishing standards, and devising training criteria for lay marital mediators.

54. See, e.g., State Bar Association v. Conn. Bank & Trust, 145 Conn. 222, 140 A.2d 863, 69 A.L.R. 2d 394 (1958).

55. State Bar of Arizona v. Arizona Lamp Title & Trust Co., 90 Ariz. 76, 336 P.2d 11 (1961).

56. Mnookin & Kornhauser, Bargaining in the Shadow of the Law: The Cases of Divorce, 88 Yale L.J. 950 (1979).

57. See, e.g., In re opinion of the Justices, 289 Mass. 606, 194 N.E. 313 (1935), R.J. Edwards, Inc. v. Hert, 504 P.2d 407 (Okla. 1972).

58. Auerbacher v. Wood, 139 N.J. Eq. [illegible]9, 53 A.2d 863 (1947), aff'd, 142 N.J. Eq. 484, 59 A.2d 863 (Ct. Err. App. 1948); Gardner v. Conway, 234 Minn. 468, 48 N.W. 2d 788 (1951).

59. L.A. County B.A., Comm. on Legal Ethics, Opinions, No. 270 (1962).

60. Cal. S.B.A. Comm. on Prof. Resp. and Conduct, Opinions, No. 1969-18 (March 11, 1969).

61. L.A. County B.A. Ethics Comm., Opinions, No. 372 (Feb. 21, 1978).

62. See generally, Note, Lay Divorce Firms and the Unauthorized Practice of Law, 6 U. of Mich. J.L. Ref. (1973); Project, The Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis, 86 Yale L.J. 103 (1976).

63. Alaska Bar Ass'n v. Foster, C.A. No. 73-161 (Super Ct. Alas. Oct. 29, 1973), reported in 38 Unauth. Prac. News. 75, 75-80 (1974); Florida Bar v. Stupica, 300

So.2d 683 (1974).

64. Oregon Bar v. Gilchrist, 538 P.2d 913 (Or. App. 1975); State v. Winder, 42 App. Div. 2d 1039, 348 N.Y.S.2d 270 (1973). *Cf.* New York County Lawyer's Association v. Darcy, 21 N.Y.2d 694, 234 N.E.2d 459, 287 N.Y.S.2d 422, *rev'g* 28 App. Div 2d 161, 283 N.Y.S.2d 984 (1967).

65. Minnesota State Bar Ass'n v. Divorce Reform, Inc., No. 396448 (Dist. Ct. Minn., April 18, 1975) reported in Minnesota Bar Wins Sweeping Victory Against a Lay Practitioner of Divorce Law, 39 Unauth. Prac. News 187, 188-93 (1975); State Bar v. Brandon (Nev. Dist. Ct. Clark County, August 23, 1972), reported in Nevada Divorce, 37 Unauth. Prac. News, 32, 37-42 (1973).

66. *See* Note, Lay Divorce Firms and the Unauthorized Practice of Law, 6 U. of Mich. J.L. Ref. 423 (1973).

67. N.C.S.B.A. Unauthorized Practice of Law Comm. (Oct. 1980).

68. N.Y.C.B.A. Comm. on Professional and Judicial Ethics, No. 80-23 (Feb. 27, 1981).

69. *Id.* at 14.

70. Bost. B.A. Comm. on Ethics, Opinion, No. 78-1 (1978).

71. Such interdisciplinary efforts have been undertaken by the Family Mediation Center in Portland, Oregon, Northwest Mediation Services in Seattle, Washington, and Family Dispute Services in Minneapolis, Minnesota. Commentators have also endorsed such a model. See Black & Joffee, A Lawyer/Therapist Team Approach To Divorce, 16 Conc. Cts. Rev. 1 (1978); Editorial, Interprofessional Cooperation Between the Law and the Behavioral Sciences: A Priority Need, 17 Conc. Cts. Rev. iii (1978); Greenstone, An Interdisciplinary Approach to Marital Disputes Arbitration: The Dallas Plan, 16 Conc. Cts. Rev. 7 (1978).

72. Md. S.B.A. Comm. on Ethics, Opinions, No. 80-55A (August 20, 1980) at 4-5.

73. Ethical Consideration 3-8 provides that lawyers should not practice law in association with laymen nor should they split fees with laymen. Disciplinary rule 3-102 provides

specifically that lawyers may not divide fees with non-lawyers. Disciplinary Rule 3-103 provided that lawyers may not form a partnership with a non-lawyer if any of the activities of the partnership constitute the practice of law.

74. See American Bar Foundation, Annotated Code of Professional Responsibility 148-150 (1979).

75. Ethical Consideration 3-3 continutes: "This does not mean, however, that the pecuniary value of the interests of a deceased lawyer in his firm or practice may not be paid to his estate or specified persons such as his widow or heirs. In like manner, profit-sharing retirement plans of a lawyer or law firm which include non-lawyer office employee are not improper. These limited exceptions to the rule against sharing legal fees with laymen are permissible since they do not aid or encourage laymen to practice law."

76. Disciplinary Rule 3-102 states: A lawyer or law firm shall not share legal fees with a non-lawyer, except that:

1. An agreement by a lawyer with his firm, partner,

or associate may provide for the payment of money over a reasonable period of time after his death, to his estate or to one or more specified persons.

2. A lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer.

3. A lawyer or law firm may include non-lawyer employees in a retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

77. Oregon B.A. Comm. on Legal Ethics, Proposed Opinion, No. 79-46 (1980).

78. *Id.*

79. *Id.*

80. *Id.*

81. Ethical Consideration 2-11 provides in part: The name under which a lawyer practices may be a factor in the

selection process. The use of a trade name or an assumed name could mislead non-lawyers concerning the identity, responsibility, and status of those practicing thereunder. Accordingly, a lawyer in private practice should practice only under a designation containing lawyer's own name, the name of an employing lawyer, the name of one or more of the lawyers practicing in a partnership, or, if permitted by law, in the name of a professional corporation for the practice of law, which should be clearly designated as such ...

82. Oregon B.A. Comm. on Legal Ethics, Proposed Opinion, No. 79-46 (1980).

83. The exception is spelled out in DR2-103(D)(4)

> "A lawyer or the lawyer's partner or associate or any other affiliated lawyer may be recommended, employed or paid by, or may cooperate with one of the following offices or organizations which promote the use of the lawyer's services or those of a partner or associate or any other affiliated lawyer if there is no interference with the exercise of independent professional judgment in behalf of the client:
>
> 1. A legal aid office or public defender office
>
> a. Operated or sponsored by a duly accredited law school;
>
> b. Operated or sponsored by a bona fide, non-profit

community organization;

c. Operated or sponsored by a governmental agency; or

d. Operated, sponsored or approved by a bar association;

2. A military legal office;

3. A lawyer referral service operated, sponsored or approved by a bar association;

4. Any bona fide organization which recommends furnishes or pays for legal services to its members or beneficiaries provided the following conditions are satisfied:

a. Such organization, including affiliate, is so organized and operated that no profit is derived by it from the rendition of legal services by lawyers, and that, if the organization is organized for profit, the legal services are not rendered by lawyers employed, diredted, supervised or selected by it except in connection with matters where such organization bears ultimate liability of its member or beneficiary.

b. Neither the lawyer, nor the lawyer's partner, nor associate, nor any other affiliated lawyer nor any non-lawyer, shall have initiated or promoted such organization for the primary purpose of providing financial or other benefit to such lawyer, partner, associate or affiliated lawyer.

c. Such organization is not operated for the purpose of procuring legal work or financial benefit for any lawyer as a private practitioner outside of the legal services program of the organization.

d. The member or beneficiary to whom the legal services are furnished, and not such organization, is recognized as the client of the lawyer in the matter.

e. Any member or beneficiary who is entitled to have legal services furnished or paid for by the organization may, if such member or beneficiary so desires, select counsel other than that furnished, selected or approved by the organization for the particular matter involved; and the legal service plan of such organization provides appropriate relief for any member or beneficiary who asserts a claim that representation by counsel furnished, selected or approved would be unethical, improper or inadequate under the circumstances of matter involved; and the plan provides an appropriate procedure for seeking such relief.

f. The lawyer does not know or have cause to know that such organization is in violation of applicable law, rules of court of other legal requirements that govern its legal service operations.

g. Such organiation has filed with the appropriate disciplinary authority at least annually a report with respect to its legal service plan, if any, showing its terms, its schedule of benefits, its subscription charges, agreements with counsel and financial results of its legal services activities or, if it has failed to do so, the lawyer does not know or have cause to know of such failure.

A lawyer shall not accept employment when the lawyer knows or it is obvious that the person who seeks services does so as a result of conduct prohibited under this Disciplinary Rule.

Advertising permitted under DR2-101 shall not be deemed in violation of any provision of this Disciplinary Rule.

84. ABA Canon 35, entitled "Intermediaries." Present Disciplinary Rule 5-107(B) has been used to take the place of the earlier canon. It provides: "A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services."

85. L.A. Cty. B.A., Comm. on Legal Ethics, Opinions,

No. 270 (Jan. 17, 1962).

86. ABA Comm. on Prof. Resp. Opinions, No. 297 (February 21, 1961); N.Y.S.B.A. Comm. on Prof. Ethics, Opinions, No. 22 (May 28, 1962); Tex. S.B.A. Comm. on Prof. Ethics, Opinions, No. 128 (February, 1956).

87. See discussion in text accompanying notes 88-112 infra.

88. Coogler's mediation approach is described in his own book, O.J. Coogler, supra note 1 at 23-29. Coogler also offers a detailed discussion of some of the professional responsibility issues raised by his approach at 85-92.

89. Id. at 8.

90. Md S.B.A. Comm. on Ethics, Opinions, No. 80-55A (August 20, 1980).

91. Id.

92. This information was received from Family Dispute Services in Minneapolis, Minnesota.

93. Va. S.B. Comm. on Legal Ethics, Informal Opinions, No. 400 (Sept. 1979); Va. S.B., Comm. on Legal Ethics. Opinions (June 10, 1980). Although the Committee found no Canon 5 violation, they disapproved of mediation for other reasons.

94. Md. S.B.A. Comm. on Ethics, Opinions, No. 80-55A (August 20, 1980).

95. Id. at 6.

96. Id. at 7.

97. Disciplinary Rule 5-102 provides: (A) If after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR5-101.

98. Md. S.B.A. Comm. on Ethics, Opinions, No. 80-55A (August 20, 1980) at 7.

99. *Id.* at 11.

100. N.Y.C.B.A. B.A. Comm. on Professional and Judicial Ethics, No. 80-23 (Feb. 27, 1981).

101. *Id.*

102. *Id.*

103. *See* note 83 *supra*.

104. 389 U.S. 217 (1967).

105. 377 U.S. 1 (1964)

106. 371 U.S. 415 (1963)

107. Disciplinary Rule 2-103D (4)a.

108. Disciplinary Rule 2-103D (4)b.

109. Disciplinary Rule 2-103D (4)c.

110. Disciplinary Rule 2-103D (4)d

111. Disciplinary Rule 2-103D (4)e.

112. Disciplinary Rule 2-103D (4)f.

113. United Mine Workers v. Illinois State Bar Association, 389 U.S. 217 (1967); Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1 (1964); NAACP v. Button, 371 U.S. 415 (1963). *See generally* American Bar Foundation, Annotated Code of Professional Responsibility at 72-73.

114. "We hold that the freedom of speech, assembly and petition guaranteed by the First and Fourteenth Amendments gives petitioner the right to hire attorneys on a salary basis to assist its members in the assertion of their legal rights." United Mine Workers v. Illinois State Bar Association, 389 U.S. 217 (1967) at 221-22.

115. *E.g.*, Va. S. Ct. Rules §2, Part 6, Rule 2-103D.

116. Va. S.B. Comm. on Legal Ethics, Informal Opinion No. 400 (Sept. 1979); Va. S.B. Comm. on Legal Ethics, Opinion (June 10, 1980).

117. Va. S.B. Comm. on Legal Ethics, Informal Opinion No. 400 (Sept. 1979).

118. Va. S.B. Comm. on Legal Ethics, Opinion (June 10, 1980).

119. N.Y.C.B.A. Comm. on Professional and Judicial Ethics, No. 80-23 (Feb. 27, 1981).

120. Id. at 16-18.

121. Id. at 18.

122. Another exception to the prohibition on lawyer referrals in 2-103(D) is that of "A lawyer referral service operated, sponsored or approved by a bar association." See also Ethical Consideration 2-15 stating the "The legal profession has developed lawyer referral systems designed to aid individuals who are able to pay fees but need assistance in locating lawyers competent to handle their

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particular problems."

123. 433 U.S. 350 (1977).

124. 436 U.S. 412 (1978) *But compare* Primus *with* Ohralik v. Ohio State Bar Ass'n 436 U.S. 447 (1978).

125. Rule 5.4 entitled Professional Independence of a Firm provides:

> A lawyer may be employed by an organization in which a financial interest is held or managerial-authority is exercised by a non-lawyer, or by a lawyer acting in a capacity other than that of representing clients, such as a business corporation, insurance company, legal services organization or government agency, but only if the terms of the relationship provide in writing that:
>
> (a) There is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship;
>
> (b) Information relating to representation of a client is protected as required by Rule 1.6;
>
> (c) The arrangement does not involve advertising or personal contact with prospective clients prohibited by Rules 7.2 and 7.3; and
>
> (d) The arrangement does not result in charging a fee that violates Rule 1.5.

Rule 7.3 entitled Personal Contact with Prospective Clients provides in part (a):

(a) Subject to the requirements of paragraph (b), a lawyer may initiate personal contact with a prospective client for the purpose of obtaining professional employment only in the following circumstances:

> (1) If the prospective client is a close friend, relative, former client or one whom the lawyer reasonably believes to be a client;
>
> (2) Under the auspices of a public or charitable legal services organization; or
>
> (3) Under the auspices of a bona fide political, social, civic, fraternal, employee or trade organization whose purposes include but are not limited to providing or recommending legal services, if the legal services are related to the principal purposes of the organization.

See the American Bar Association Commission on Evaluation of Professional Standards, Proposed Final Draft, Model Rules of Professional Conduct (May 30, 1981) at 175, 194. In the Alternative Draft, the subject is covered in DR 2-104 (Suggestion of Need of Legal Services) and DR 3-103 (Professional Independence of a Firm). See American Bar Association Commission on Evaluation of Professional Standards, Alternative Draft, Model Rules of Professional Conduct (May 30, 1981) at 37, 75.

126. Notes to Rule 7.3, American Bar Association Commission on Evaluation of Professional Standards, Proposed Final Draft, Model Rules of Professional Conduct (May 30, 1981) at 196.

127. Notes to Rule 5.4, American Bar Association Commission on Evaluation of Professional Standards, Proposed Final Draft, Model Rules of Professional Conduct (May 30, 1981) at 178.

128. Id.

129. Md. S.B.A. Comm. on Ethics, Opinions, No. 80-55a (August 20, 1980) at 4.

130. DR 5-107 (B) provides: A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services.

131. See, e.g. In re Primus, 436 U.S. 412 (1978); Bates v. State Bar, 433 U.D. 350 (1977); United Mine Workers v. Illinois State Bar Association, 389 U.S. 217 (1967).

132. See Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) (mandatory minimum fee schedule constituted Sherman Act violation). Provisions in ethics codes of other professional organizations have been subject to a similar fate. See National Society of Professional Engineers v. United States, 435 U.S. 679 (1978). In some instances, the state action exemption will shield state-regulated activity from antitrust liability. See Bates v. Sate Bar of Arizona

433 U.S. 350 (1977).

133. Compare In re Primus, 436 U.S. 412 (1978) with Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978). See also Bates v. State Bar, 433 U.S. 350 (1977).

134. Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975). See generally Huber, Competition at the Bar and the Proposed Code of Professional Standards, 57 N.C. L. Rev. 559 (1979).

AN ESSAY ON THE ETHICS OF SEPARATION AND DIVORCE MEDIATION

By Lawrence D. Gaughan

There is widespread sentiment among mental health professionals and the general public that the adversarial system is not working very well in divorce settlements. Many, and perhaps most, lawyers agree to a greater or lesser extent with this assessment. The disadvantages of an adversarial divorce may be substantial. These can include emotional stress, harm to family relationships, disruption of coparenting, needless expenditures of money and time, lack of flexibility and satisfaction (the latter often leading to relitigation), and excessive institutional intrusion into private decisions.

Unfortunately, the ABA Code of Professional Responsibility does not deal adequately with the special needs of family law practice. Some observers believe that the Code is partially the cause of the problems mentioned. It is also regrettably true that there are attorneys in family law practice who appear not to understand the dignity and restraint inherent in the highest traditions of the adversarial system itself.

The reality of divorce law is that zealous advocacy is too often excessive advocacy. This is carried out through overextensive civil discovery, resort to unnecessary motion hearings, vindictive use of contempt citations, and lengthy exchanges of posturing letters which supposedly are meant to pass as "negotiations."

Of course, there are many divorce attorneys who do their best to make an unsatisfactory system work. And, indeed, many cases are best settled by negotiation between lawyers who are not emotionally involved in their clients' cases and have no need to overemploy the adversary process for financial gain. There are also cases for which litigation, carried on in a businesslike manner, is the only workable way to achieve a decision. Nonetheless, many attorneys have at one time or another expressed the thought that there should be a better way to settle the legal issues incident to separation and divorce.

Over the past five years, the organized bar has begun cautiously to consider family mediation as a viable alternative. Much is now known about the dynamics of successful mediation. There is no longer any need to "shoot in the dark" or to "reinvent the wheel." Attorneys have been among the leaders in this development. The theory and practice of family mediation can be taught to lawyers who want to develop their expertise. In the hands of some established professionals, mediation is already working and working well.

Family mediation is clearly an important potential field for lawyers. Yet the legal profession has not moved with any great speed to develop the mediation alternative. Mediation is a systems change, and system changes always take place against the inertia of the familiar. Many lawyers find themselves stating that they believe in principle in mediation, but they still do not refer any of their cases to mediation. Right away one hears the qualifying statements, such as: "Mediation is a good idea if it works, but we know that it will usually only add time and expense without settling anything." "It is fine for the peripheral issues such as dividing the household goods and setting up a visitation schedule. But not for the 'real' issues." "Of course, attorneys can't be mediators because of the conflict of interest problem."

These "friends of mediation" may then very quickly go on to criticisms supposedly directed to the ethical basis of mediation. The critics may have seen the results of a mediation which was done badly by an untrained or inexperienced mediator. They worry about the influx of new mediators coming from outside of the legal profession. But they also hypothesize reasons why attorneys can't be mediators. They profess to be concerned about confidentiality.

They see the problems of imbalance of power and lack of informed consent (knowledge of rights) as difficult to solve, if not insoluble.

Almost without exception, none of these critics has ever done a single mediation. Nor have they probably even sat in to observe one. Their lack of curiosity as to how successful mediation can take place is surprising in the light of their willingness to write and lecture on the ethics of mediation. The criticisms of mediation are incomplete unless they are based upon experience and are set against the very real problems in the adversarial practice of family law. The obvious fact is that a genuinely responsive set of ethics for family law practice has not been very well developed. The public and professional criticism of the excesses in adversarial family law practice is mostly justified.

This last observation is made in order to pinpoint the real challenge: Why should the ethical standards for family mediation be set by applying principles designed for a general system of adversarial practice? If those principles are not working well for family law practice, why should they be applied where they are even less responsive to individual and social needs? Let's create a new system. And to accomplish this, let us return to basics. Our first inquiry must be as to the social and ethical goals that are desirable in a system for resolving divorce related disputes.

We may start with a consideration of what the consuming public (separating and divorcing spouses) seems to desire. Of all the things that spouses may want in a divorce settlement system, there is only one that they should be discouraged from attempting to obtain. That is an outlet for anger against the other spouse, and even for vengeance. Yet this is precisely what the adversary system tends to encourage and, at times, to reward. The social cost to families from such a system is far too high. And the result is a high incidence of escalating emotional reactivity, in which even the attorneys become involved, carried out through fruitless "negotiation" and needless civil discovery and court battles.

Goals of a Responsive System:

A model system to decide the legal issues arising from separation and divorce would meet as many as possible of the following goals:

1. Settlements are fair and practical.

2. Family relationships, and especially coparenting and parent-child relations, are fostered. At the very least they are not needlessly disrupted.

3. The costs of professional services are kept to a minimum, consonant with the skills which are required.

4. Decisions are made as quickly as possible, consistent with a fair and effective process.

5. The settlements are tuned as finely as possible to the needs, entitlements, goals, and values of the participants.

6. The results are as satisfactory as possible to the participants, so as to encourage future cooperation and to discourage subsequent litigation.

7. The parties take part to the fullest extent possible in making and being responsible for their own decisions.

8. Power in a couple is balanced and negotiation and communication between them made to be effective. Decisions are not made out of guilt or through manipulation, and are not dictated by one of the participants.

9. The process of settlement is as cooperative as possible.

These are both practical and ethical goals. In many cases of divorce settlement, they are best promoted by mediation. There is also a further important principle, which is the right of individuals to have access to a full and practical range of disputes settlement alternatives.

Some lawyers have raised the question of informed consent as a precondition to mediation. These same attorneys may well ask themselves whether they give their clients a genuine basis for informed consent to their participation in the adversarial system.

Mediation can be done ethically and effectively by attorneys. It is not the purpose of this paper to deal with the techniques of effective mediation. Suffice it to restate that the theory and techniques of family mediation are now reasonably well understood, and can be learned and used by many lawyers. This paper is concerned with the ethics of effective mediation.

Ethical Principles:

The following are suggested as some of the most basic ethical principles for family mediation by attorneys:

One. An attorney mediator should not mix mediation and law practice in the same case. The "hats" are different. This principle means that a lawyer who mediates should refer the couple for any legal advice and for drafting. In the future this may be demonstrated to be an unnecessary constraint, but for the moment it is better to be conservative on this issue.

Two. A lawyer mediator may discuss with a potential client in a preliminary and impartial way the

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implications of both mediation and representation. The public has a right to be fairly informed as to the advantages and disadvantages of the different settlement methods. But once the attorney is committed to one track, whether mediation or representation, a referral should be made as to the other. (A corollary principle should require an adversarial attorney to advise a client on the availability of mediation in appropriate circumstances.)

Three. *Legal information is not legal advice and may be imparted by the mediator in proper situations*. Legal information is general and impartial, while legal advice is specific and representational. The distinction is no more obscure than many other distinctions which are commonly drawn by attorneys. For example, it is legal information to set forth the principle of *Commissioner v. Lester* which permits child support to be treated as alimony if set forth in a unitary clause. It is appropriate to discuss generally the advantages and disadvantages of a *Lester* provision. But it is legal advice to suggest that a unitary sum is proper or improper for the couple's situation. It is also inappropriate (and is rather a matter for an accountant) to attempt to fix a dollar transfer figure to achieve a certain after-tax sum in the hands of the recipient.

Four. The mediator should be sure that the parties understand his or her role and the mediation process. There should be an initial screening at the start of the mediation. This has as its purpose giving the couple an understanding of the mediation process and a chance to meet the mediator. At this initial conference, the mediator makes an accurate disclosure of his or her role. The couple should not be misled into thinking that the mediator will act as a common lawyer for both spouses, will recommend a reasonable solution for them, will act as an arbitrator, or will function as a marriage or divorce counselor. The potential cost savings of mediation should not be oversold. Mediation should not be presented as a comprehensive panacea to the difficult emotional and legal problems of separation and divorce. And a given mediation should not be accepted if the mediator thinks that it is not very likely to be successful.

Five. A mediator should be as neutral and impartial as possible. Of course no human being can be completely impartial, and every mediator has biases and prejudices. What the mediator can do is to balance the power in the couple and to make their communication and negotiation more effective. Every mediator should be aware of his or her values, beliefs, biases, and prejudices, as well as of his or her own approaches to conflict resolution and reactions to human conflict.

Six. The mediator should avoid secret communications and pressure tactics. There should not be any secret communications to and from the mediator, especially where the spouses are seen separately. The mediator should not manipulate separate sessions to bring pressure on one or both spouses to accept a solution emanating from the mediator rather than the couple.

Seven. The confidentiality of mediation sessions should be protected by an agreement signed by the mediator as well as the couple. This will specify that the mediator will not be called as a witness and that his or her records will not be subpoened. It will also state that offers or stipulations made in mediation will not be admissable in court. And, finally, the couple should be informed of any limitations on the enforceability of such an agreement in the applicable jurisdiction.

Eight. The mediator should respect the autonomy of the couple. This means that they, and not the mediator, should control the substance of the solution. Even the mediator's control of the process should be based upon the couple's consent. If the couple is asked to accept a set of written rules for mediation, the implications of using the rules should be fully explained.

Nine. Each spouse should have access to independent counsel at all times during the mediation. Whether such an attorney is to be retained or consulted, or even contacted at all, is generally a matter for the individual choice of each spouse. But the couple should be told by the mediator that they are going to be making important decisions and that they have a right to be fully informed as to the implications of those decisions. It is not legal advice, of course, for the mediator simply to raise a question in open session as to the practical implications of a request or concession. But it may be necessary at times for the mediator to insist that legal counsel be consulted.

Ten. A full and complete disclosure of property and other assets, income, deductions, liabilities, and present or projected monthly budgets is absolutely essential. This is the mediation alternative to the civil discovery process. If one of the parties appears to be concealing relevant information, then the mediator has an obligation to seek a full disclosure. This may require a frank confrontation in an individual session, the conduct of an independent investigation by an agreed third party, and even civil discovery through attorneys if necessary.

Eleven. *The mediator should always guard against any misuse of the mediation process by either party*. Improper use of mediation may take place where one party seeks to use the process to bring pressure for inappropriate proposals, to deprive the other party of the protection of counsel, to attempt to hide assets, or to delay litigation in bad faith. A mediator cannot be naive and in a proper case should confront the inappropriate goals or the use of improper tactics by one of the parties. This should be done even if it means that some cases may be lost to the adversarial system.

Twelve. *The mediator has an obligation to raise all of the issues relating to a complete and fair settlement*. It is understood that at times the mediation will be made more difficult if this duty is carried out. Examples of issues which need to be raised, where the facts suggest it, are the consideration of whether pension rights and interests in a professional practice are property to be divided in the settlement. Another example is the question as to whether spousal support terminates or is abated on cohabitation short of remarriage. The failure to carry out the duty of completeness probably is that aspect of mediation which poses the greatest risk of a malpractice suit against the mediator.

Thirteen. The attorney(s) to whom an agreement is referred for drafting should always be independent of the mediator. The mediator's task is to submit a memorandum of the agreement for review by both parties. Once they have cleared the memorandum, it is then sent to the attorney(s) for drafting and any review. Where both parties are represented, the mediator should not be offended if the attorneys engage in further negotiation on points of detail. If a single attorney drafts for one or both parties, the mediator may expect on occasion to be asked to furnish additional information. At times a further mediation session may become necessary to obtain the parties' agreement on a point the drafting attorney considers important to have covered. The mediator should always review the completed agreement, and any issues of draftsmanship should be raised with the attorney(s) rather than with the parties.

Fourteen. Every mediator should be a professional in the best sense of that term. Family mediation is a complex and difficult field. A mediator must acquire as quickly as possible training and experience adequate to the tasks and challenges of mediation. Usually this will require consultation with and supervision by an experienced mediator. True professionalism requires intellectual humility. There must be a long-term dedication to improving knowledge of the parameters of fair settlements, tax options, real estate, investments, and so forth. This need for professional development also includes the skills and understanding pertaining to the divorce process, children of divorce, the emotional patterns in families, conflict resolution, and the strategy and tactics of mediation. A professional attorney mediator should exchange ideas and experience with other mediators, including those who are not attorneys. The mediator should also be current in the literature relevant to this developing field of skill and knowledge. Every mediator must have an awareness of his or her limitations as well as skills as a mediator. And, finally, each mediator needs to have a developed professional conscience and a sense of the pervading importance of ethical considerations.

These are some of the most important ethical issues which mediators need to confront. They are interrelated with the skills of mediation itself. One cannot get far in an understanding of these issues if one is limited to the logic of principles relating to the adversary system. Conflict of interest is seldom a problem in the proper practice of mediation by attorneys. In any event, the problem with adversarial divorce settlements has been an excessive, rather than insufficient, focus upon the conflict of interest principle.

Many couples prefer to work together in their divorce settlement. The advantages of cooperation outweigh those of conflict in most such situations. An "ethical" principle which promotes conflict rather than cooperation is therefore inadequate to the needs of social policy in this area.

The fact is that cooperative solutions tend to be less expensive, quicker to achieve, more flexible and more finely tuned, more beneficial to the relationships of the parties, more consistent with personal responsibility, more satisfactory and hence more likely to be permanent. Some of these observations apply, of course, to attorney-negotiated agreements as well as to mediation. But in my opinion, based upon an extensive contact with both systems, mediated settlements tend to achieve more of these goals more of the time.

Since mediation is a new professional field, some bad mediation will continue to be done, and probably at times by attorney mediators as well as by those coming from other disciplines. My observation, however, is that lawyer mediators work through many of the problems rather quickly. (These include skewed [one-sided] settlements, failure to discuss or attempt to resolve all of the relevant issues, incomplete and overly complex settlements.) Attorneys are also adept at getting full disclosure of information. Lawyer mediators should be skilled at distinguishing between legal advice and legal information. Most attorney mediators of my acquaintance are, if anything, quite careful on ethical issues.

Two attorney skills which are very helpful in mediation are the negotiation one often does with one's own client and the technique of effective cross-examination. The art of good cross-examination requires an ability to obtain favorable admissions from an unwilling party. Most family law practitioners have useful experience in the divorce process. Many attorneys really do understand what constitutes good negotiation.

Our own mediation practice is presently carried on by six professionals, four of whom are lawyers. For many years I was one of the skeptical "friends of mediation" referred to earlier. What changed my mind was seeing how well mediation works in most cases, even with the most emotionally-enmeshed couples. At our mediation center there are complete agreements in the case of approximately 85-90% of all couples who agree to mediate. It is also instructive to consider the situation of couples who do not reach a full settlement. Some of them decide to reconcile, while others go back to the adversarial system with some of the issues settled and with a resolution to have the others decided with more dignity and restraint. We almost never experience a completely failed mediation.

Each of us is well aware that we are looking at the frontiers of a challenging new service profession. We are also adversarial attorneys, and since we never mix cases we do a considerable amount of referral to other lawyers and other mediators. Frequently we consult with each other on the ethical issues of our practice, as well as on theory and technique. We also learn from the lawyers to whom we refer for legal advice and drafting, and from the mediators to whom we refer our law clients. It is important to us that as much mediation as possible, ours as well as that of other mediators, be done well and ethically. The challenge of mediation is that these goals are achievable.

THE DARK SIDE OF MEDIATION:

STILL UNEXPLORED

By Richard E. Crouch
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Washington, D.C., & Chairman of the ABA
Family Law Section's Ethics Committee

The popularity of mediation as an answer to some of the very real problems we have with divorce litigation as a dispute-resolution process is impossible to deny. Just now it is riding the crest of an immense wave of fad appeal, both inside the professions and in the popular media.

While the legal profession tries in its sober fashion to debate some of the questions raised, it is being assaulted -- along with the rest of the public -- by a barrage of articles on various levels of sophistication that extol mediation as the surefire remedy. The happy preachers of this new faith are used to preaching to the converted. Their articles roll blithely on as though there were no other side to debate. And in a way, that is true, for it is as difficult right now to be against mediation as it once was to be against motherhood.

Often the practicing lawyers and judges who have very serious reservations are, quite simply, afraid to speak up. The reason these usually-outspoken people are now silent, or just muttering under their breath, is that there is a built-in credibility problem. Mediation is being peddled as a pro-consumer and anti-lawyer movement, so that any lawyers who question it will risk being tarred with the brush of institutional greed. Any efforts to criticize the new practice, or restrict it by rules, can be condemned as a selfish profession's efforts to protect its turf and maintain high fees. To mediation advocates, the Marxian theory of economic determinism lurks behind every bar expression of ethical and public-policy reservations.

WAVE OF THE FUTURE?

Also, cautious lawyers who think mediation just might be the wave of the future do not want to cut themselves off from an alternative source of future income.

Finally, there is no denying that it is easier to endorse mediation -- at least if you address an unsophisticated audience. It makes us feel good to mouth the cliches: it makes us feel virtuous, and all warm inside.

So why don't I sprint for the nearest mediation bandwagon? Surely I am clever enough to see the handwriting on the wall.

I myself am not against mediation: I could list immediately about five or six reasons why this country desperately needs something that will give couples an alternative to the dismal spectacle of unnecessarily destructive divorce litigation. Also, it hurts me to know that there are some cases about which the parties can truly say that divorce settlement was going on smoothly and amicably until the lawyers got into it.

In fact -- as I suspect thousands of lawyers are telling themselves right now -- I'd make a wonderful mediator. I'm warm and compassionate, exquisitely objective, worldly and wise, incredibly sensitive, and yet practical. I am result-oriented and able to focus immediately on what's relevant and guide less gifted people away from arguments over things they actually agree upon. The divorcing public needs me. So why didn't I jump on several years ago when I could already see, with my great insight,

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that clearly this fad was going places? There's good money in it, and I need the money.

It's just that I can see glaring ethical problems to which no one yet seems to have any answers that stand up under logical analysis. I see considerable danger of ethics code violations and malpractice liability for lawyers, along with tremendous potential for the exploitation of unsuspecting clients. I go around asking the questions, sincerely and politely, and I am still waiting for the answers.

For purposes of this discussion, we are talking about lawyers who get into the mediation game -- whether as mediators or as post-mediation advisors, draftsmen, or (as in "structured mediation",[1] advisor-draftsmen), and not about the various psychologists, social workers, and non-graduates who are trying their hand at it. Also, I leave aside court-run mediation programs, which raise a few problems of their own but are by far a more palatable alternative.

What has been done by the authorities so far is not very satisfactory. What has taken place so far is a curious sideways movement that avoids coming to grips with the really tough ethical issues in mediation. A few state and local bar groups have issued opinions on mediation and dual representation lately, and there have been a few articles. However, the opinions, if they don't reject mediation schemes entirely, tend to point out the ethical dangers, and then conclude that nevertheless something so good just couldn't be unethical. They end up giving a grudging, and unexplained, approval bracketed by warnings about the extreme care lawyers must use. They want you to restrict the alternative procedures to a very narrow class of cases in which mediation will be ethically safe.[2]

Each new opinion cites previous ones, however cautious, as being approvals of mediation and dual representation, even if the theoretical class of permissible cases is so thin that it isn't likely to exist in real life. Scholarly articles build on these ambiguous bar opinions, give reluctant recognition to the fact that they don't really permit very much, and argue that somehow things ought to be better. These articles are then cited as pro-mediation authority.

THE ETHICAL ISSUES

So I am not hostile; I am just waiting for answers. I really have not heard yet. So what problems am I talking about? As I see them, the problems are these:

First, does it save anyone any money? Remember, mediation is being heralded as financial rescue. In my own community I see fairly expensive mediation services added as an extra layer to an already long and taxing process of separation-agreement negotiation and court processing of the "uncontested" divorce pleadings. In some cases I think two reasonably skilled adversary lawyers would hash out an agreement by means of traditional divorce negotiation -- with the ever-present threat of litigation as a backdrop -- in a fairly short time.

It is true that the parties might not feel the same personal identification with the agreement that supposedly keeps them more loyal to it in the future, but the long interpersonal confrontations are something they will not have had to pay for. Sometimes the traditional mechanism, keeping the parties apart, probably offers the alternative that is quicker and cheaper as well as less stressful. Sometimes I think the people who want to continue intense hostile involvement and personal stress and aren't really interested in saving either money or time, are just the ones that mediation gets. However, I worry about those who go into it seeking reduced costs and reduced stress, end up with neither, and feel that lawyers have swindled them once again.

So if people are going to feel like that, I would rather it be mediating psychiatrists or social workers -- or even unlicensed and non-professional mediators -- that they blame. It's a good argument for avoiding legal ethics questions by keeping lawyers out of it.

EXPLOITER'S ALLY

Then too I wonder about the mediators who unwittingly fall in with, and facilitate, the exploitation of one party. Lawyer-mediators, clever as they are (and I have to admit I have also met some who are none too swift) can be psychologically exploited too. And the problem still exists even if the mediator does perceive what is going on.

A lawyer trying to preserve the mediation climate will at least have to make some extremely subtle judgments about when to alert the other party to overreaching. The bright new ideas of client self-determination and autonomy are consistent with letting one party freely choose to be a victim of exploitation. However, it is both a factual and a philosophical question to decide the degree to which a particular person's choice is free. In the unfathomable subtleties of long-standing marital relationships, a dominant party can even be the one who appears on the surface to be the weaker party, and this can be subtle enough to fool even trained and experienced observers.

The attorney may go to ultimately unwarranted lengths to preserve the tenuous mediation agreement from breaking down. Now insofar as the attorney lets mediation go on, or solves the problem by cutting mediation off, that attorney is probably acting for one of the parties and against the other. This is because in most situations of exploitation, one party benefits and the other loses, by the continuation of mediation.

Also, ignorance of what a court would do with the particular case nearly always operates to the benefit of one party and the detriment of the other, even if they both are ignorant. And the lawyer who sounds the alarm about overreaching, so as to cut mediation off, had better be sure that it really was overreaching and was sufficiently exploitative to warrant this remedy. That is because scuttling the mediation effort not only hurts the party who was dominant at that moment, but costs both of them a lot of wasted time, money and effort.

Also, both the lawyer and the mediation center that he or she works for or takes referrals from has considerable interest in seeing "successful" mediations go through. In mediation the geometrically-projected return business from two satisfied clients who serve as "living advertisements" is a very tempting inducement. It is just what you don't get in law practice. Producing a compromise that is not entirely fair (especially when the exploited spouse, unschooled in the ways of courts, does not perceive the unfairness) may appear the preferable alternative in many close cases.

Moreover, the mediation movement's strong bias against anything morally "judgmental" has led to an ideological belief that you can compromise anything. This means meeting halfway some propositions that may be not only unspeakable but plainly irrational.

IS ANYBODY "REPRESENTED"?

Next, just what is this nonsense about "representation"? Representation as conceived by the legal profession, and indeed the English language, is something very far removed from what goes on in the mediation context. The lawyer who plays mediator is more like an impartial umpire and discussion leader and is certainly not "representing the interests" of one person against the other as an advocate.

And yet this confused idea of simultaneously representing the two opponents is found throughout much of the rhetoric. The full impact of this confusion strikes you when you ask for an explanation of a separation agreement paragraph saying "each party acknowledges he/she has had independent legal representation" and are told "Oh, the mediator was the independent legal representation for us both."

SOME RATIONALIZATIONS

The Kutak Commission's suggested new ethics rule on conflict of interest[3] embodies about the most confused concept you could find. It starts out talking about the representation of co-defendants or co-plaintiffs to the court by a single lawyer and then applies this concept to the vastly different notion of representing opposing parties to each other and to the courts. Don't think the plainly inapplicable language won't be seized upon to justify dual representation in divorce. The pressures for legitimizing a lawyer-mediation industry are such that I can assure you it will.

Some lawyers grasping for rationalizations say that they are really representing the family unit or, if custody is involved, representing the children. If you think about it, however, this is really untenable. The family unit, if it could be a lawyer's client, would have interests adverse to some of the individuals, and any lawyer who doesn't think so has simply not explored all the ramifications.[4] As for the kids, they are not paying the bills. The presumption has to be that the person paying a lawyer is the one who is getting that attorney's loyalty.

The best mediators and post-mediation lawyers say as clearly as possible that they are not representing anybody in this business. In fact, some of the ethics opinions[5] require them to. These disavowals might not be effective when they are offset by other seductive and confusing generalities that mediation clients customarily hear, but at least they are something.

In my opinion it is not enough to disavow "representation" in just those words. I think clients should also be expressly told that an attorney-client relationship has not been formed and that the "service" they are getting is not what lawyers have traditionally provided to clients. The contract and waiver that they sign should expressly acknowledge that this is a new and experimental product designed to save them money.

We think this waiver is implicit in the mere fact that the couple sought mediation, but I think experience so far shows that the clients usually don't grasp that at all. We assume they knowingly agree to do without all those good things that a lawyer as advisor-advocate traditionally provides. But I think we are letting ourselves be fooled along with them. What most of these clients really seek -- and at first think they are getting -- is the modern alternative plus the traditional lawyer-client relationship. Thus the waivers we expect absolutely have to be made plain to them.

Many lawyers rationalize their divided loyalties in these matters by saying they serve as a "mere scrivener." This would mean that they simply "put into legal language" what the parties have already agreed to without lawyer help. This sounds nice, but it doesn't hold up. The legal ethics opinions so far have understandably rejected it.[6] The reason is that actually (if we do decent work) legal language is plain English. The parties themselves could put a separation agreement into language that would be legal (i.e., for a court to incorporate into a decree). The only help a drafting lawyer contributes is in the protection or advancement of a contracting party's interests.

This is why the best lawyers taking part in this debate ask "how can you draft anything impartially?" Every slight variation in wording, every comma and period, makes one side's potential future court position better or worse. The most scrupulous practitioners say they will "draft for both" only if each party also has an independent private lawyer. This three-lawyer scheme is ideal on a number of other counts as well -- but how great a device is that for saving most people money?

WEARING MANY HATS

This is where it really begins to get sticky. These schemes might contemplate (A)"impartial legal advice" by one lawyer after lay mediation, (B) such advice by a second lawyer after lawyer mediation, (C) mediation and post-mediation advice and/or drafting by the same lawyer, and (D) "representation" to the court for divorce-procurement purposes by the mediator-lawyer or (E) the post-mediation advising and drafting lawyer,[7] or (F) divorce procurement by yet another post-mediation, post-advice and post-drafting lawyer. The most influential ethics opinions so far have said that a lawyer can get involved in the mediation scheme in one way or another so long as he or she does not represent either of the parties afterward when going in for a divorce.[8]

Everyone agrees that there should be no post-mediation representation by any involved lawyer if the agreement should break down so that it's a contested divorce case. On whether an involved lawyer can do the court representation in an uncontested case, opinion is divided. However, the New York City bar opinion, the Oregon opinion and the Boston bar opinion said no.

Another question on which opinion neatly divides is whether the post-mediation "advisory attorney" or lawyer-draftsman should see the spouses alone or together. Though it's easy to see how charges of exploitation or partiality can arise from letting this impartial and God-like creature see a party alone, forbidding it isn't necessarily the answer.

The New York ethics opinion assumes that the best way to keep the lawyer honestly impartial is to prohibit a party's seeing him/her alone -- and yet that very rule can perpetuate exploitation. There are numerous things -- income-skimming tax evasion for example, that even a divorcing spouse might well not mention to anybody in the husband's presence. Is the lawyer supposed to insure impartiality by drafting blindly, in ignorance as to these crucial matters?

CAN YOU CONSENT?

Of course, lawyer conflict of interest questions have long been resolved by resort to the legal principle that no wrong is done to him who consents. However, consent to a waiver this complicated and this far-reaching is something else again. Considering how many lawyers fail to appreciate how much conflict of interest is being consented to -- how much is being forfeited -- as part of the mediation schemes popular today, it is unlikely that clients appreciate how much protection they are giving up. Truly informed consent to a thing like this may be impossible, but if possible it certainly requires a full explanation of what, in terms of legal ethics, is going on.

The recent ethics opinions carving out a permissible niche for mediation try to cure the conflict-of-interest problem by saying that after taking all the other precautions required a lawyer must stop trying to be "impartial" when he perceives that the conflict is so severe that it just would not be proper to go on like this. Earlier ethics codes made it easier: they just said that we can assume divorce is one area where the conflict of interest will always be so severe that you can't serve opposing masters, no matter how much they consent. Now the idea is that a new rule will let the individual lawyer -- a mass of ethically sensitive nerve endings -- be the judge of that.

Now, of course, making the lawyer the judge of his or her own cause in matters of ethics is an old idea. In most matters self-regulation by the lawyer is the first line of defense against unscrupulous conduct. The lawyer, construing all doubts against himself, erring on the side of caution and avoiding the very appearance of evil, is supposed to perceive and avoid conflicts of interest.

A PERILOUS CHOICE

However, the old code gave the lawyer more definite guidelines to do that with. Perceiving when a divorce-related matter is too conflict-ridden to go on with is such a difficult concept that it's almost a joke. It can be downright ridiculous when you consider the background against which this decision will be made.

First, as noted above, the lawyer who's responsible for cutting off the mediation-advice-agreement-divorce process anywhere along the line will have a lot of people to answer to. That lawyer will lose some anticipated fees if not some earned ones. He also will have hurt the clients by telling them they have wasted the time and money invested so far. He isn't likely to get much new business by word-of-mouth advertising from these unsatisfied clients. And if this happens very often he won't get any more referrals from that mediation center either. The pressure to see a "successful" mediation go through is considerable.

That is why sensitive lawyers worry about another point of conflict between modern mediation plans and the ethics rules as we have known them. A lawyer is not supposed to sacrifice his or her independence by becoming subject to the control of lay agencies. It is easy to see how the desire to stay on a mediation referral panel could put enormous pressure on an ordinarily scrupulous lawyer's judgment. The mediation shops do not want a vast number of mediations to be unsuccessfully terminated.

Controls can be tight. In one of the most aggressively-merchandised mediation variants being pushed today, the couple have a lawyer picked for them if they can't agree on one from the available closed panel, and they promise at the outset not to seek any independent legal advice.[9]

It is for reasons like this that the current ABA ethics code forbids referral-panel schemes that will mean lay organization control over the content of a lawyer's advice to individuals. Some commentators suggest the freedom-of-association exception for First Amendment organizations and their causes as an answer to this,[10] but ethics opinions have found that mediation shops don't come within that exception. Rather, it looks like the kind of organizational influence on professional advice that could easily happen in a mediation shop is exactly what that code provision was written to avoid.

For similar reasons some analysts wonder whether it is possible ever to secure a truly ironclad waiver from parties who consent to the ethical shortcuts. The lawyer, wherever he/she comes into the process -- be it as mediator, post-mediation advisor, draftsman, etc., (or two or more of these) -- will be asking two opponents to waive legal rights they don't fully understand, without talking to any independent advisor who doesn't also "represent" the other side.

Now, the most scrupulous people in the mediation business today avoid many of the problems I have mentioned by being very stingy with themselves. These lawyers will provide the mediation, or the drafting, or the "joint independent advice" only if there are two other lawyers outside the process to provide individual counsel. Often they announce at the outset that some other lawyer will have to go to the court house for the party or parties. Usually they don't try to combine mediation with drafting, drafting with advice, or any of these with court representation, but instead are content to be paid for only one phase.

THE SCRUPULOUS ONES

Thus they deny themselves any of the shortcuts that greed, laziness, or excess zeal might otherwise lead to. Obviously this doesn't help much to cheapen the product and many of these scrupulous mediators say they never promised anybody it would. They conduct their practices in accordance with the Maryland and New York City bar opinions, which I think represent (though they don't hold out much promise of reducing costs) the best thinking so far on the subject.

Their practices of course meet many of the ethical objections I hear around me -- but as you can see, not all. I recently had a chance to ask an extremely sensitive and articulate lawyer, who has been preaching anti-adversary divorce for years and whose judgment I respect as highly as anyone's in the country, just how he answers some of these grave mediation problems. His reply was very frank: "If you mean could I ever draft a waiver that would insulate me from malpractice liability when I'm counseling both parties in a mediation case," this practitioner said, "the answer is no. But I think the search for an alternative is that important that I've got to take the risk. Somebody's got to do it."

And maybe that's the answer. It is the best one I have heard so far, anyway. Maybe it is impossible to do any more for clients than we are doing now and insulate yourself with safety. But I go one step farther.

PARANOIA STRIKES DEEP

Maybe, if you are willing to take a fresh perspective on this, the real villain of the piece is "defensive practice." It is the cruel law to which lawyers interested in survival have to conform their practices, and yet it runs up the costs of divorce in a way clients will hardly ever be able to understand. It has lately run to illogical, indefensible extremes. In my opinion one irresponsible decision like Smith v. Lewis, 530 P2d 589, 1 FLR 2265 (Calif. 1975), has the effect of setting back the search for humane divorce alternatives by many years.

Remember that cases like that rest on the assumption of complete financial greed, undiluted by any moral, emotional or public-policy factors, on the part of each individual spouse. They assume an obligation to serve that undiluted greed, and the willingness of courts to enforce that obligation. And yet all the assumptions of mediation (and of old-fashioned traditional divorce practice, I might add) are just the opposite.

I don't think you can rationally hold both sets of assumptions in your head at the same time.

In short, I think that ultimately either mediation or extreme defensive practice has to go. If we phrase our new ethics rules to endorse any of the various mediation experiments popular today, then we are really rejecting some of the primary defensive-practice assumptions, and we should say so. That would represent a tremendous service to the bar and to the client public. Defensive practice in its current form exerts a baneful influence on ordinary family law practice and a crippling influence on the honest effort to find alternatives.

A POSSIBLE NEW RULE

Failing that, which is almost too much to hope for, I think that a rule providing for mediation that's safe for lawyers and for clients would include (assuming lawyers are involved, that is) the following as a minimum:

First, a preliminary written contract (between parties and mediation providers) setting forth all the assumptions and ground rules for the mediation process, signed before the parties enter it. While including all the warnings, waivers and informed consents, it should be brief and non-technical enough to mean something to the signers.

Second, there should be a full oral explanation by the attorney of all these understandings. Things should proceed only after the lawyer is honestly satisfied that the parties genuinely understand and consent.

(These rules should apply to any lawyer getting involved, whatever his or her role, unless it is only to provide one party with independent advice in the three-lawyer situation.)

Nothing should happen immediately after the parties sign this. As with the residential real estate statute and other consumer protection laws, the rules should guarantee the parties three days after signing to think about it. This is so even though the mediation contract should be revocable at any time prior to signature of the separation agreement it produces.

The parties should be warned that their interests are presumed to conflict on many points, and that by going on they are waiving any objections to the lawyer's serving these conflicting interests.

It should be especially explained that neither one is receiving legal representation. The lawyer should also have to say that the service provided is not what lawyers traditionally provide in exchange for fees, and that no attorney-client relationship exists.

It must also be explained that this lawyer will not represent anyone involved before the court if final agreement is not reached or a party later disavows the final agreement. (You will notice I don't say the lawyer is barred from taking on the additional role of divorce representation if agreement survives. The better ethics opinions, and the more scrupulous practitioners, do add that prohibition.) A lawyer who serves as mediator, however, must be barred from later court representation of any kind.

A lawyer must see the parties separately as well as together, but should give legal advice only in the presence of both. The lawyer who has heard each party's side of it and perceives such opposition of interests that the case should not be mediated will immediately tell the parties.

The parties must be warned that the lawyer will cut off mediation anytime he or she sees the kind of overreaching that requires this drastic remedy.

Additional lawyer advice must include the lawyer's opinion on what the court would do if the case were contested, the fact that verbal promises can be retracted anytime before an agreement is signed, and the exact force and significance of a written separation agreement under local law.

The final agreement (between spouses) will expressly provide that it is not valid unless signed once, and then signed again three days later.

You will notice that this rule not only lets the lawyer try to juggle roles and wear multiple hats, but also does not require independent outside lawyer counsel. If a party wants to get it during the three-day waiting period that is his or her business. The un-waivable waiting periods will make a mediated agreement harder, in some ways, to get than an ordinary separation agreement -- but the precautions are ones that can't be blamed on the legal profession's greed, and that don't in fact cost money.

I think this suggested rule, or something like it, is worth trying, because alternative dispute resolution is worth it. Mediation is not the cure-all that the hucksters, the cultists and the happy zealots among the learned professions would have us believe; but it is a worthwhile idea. If mediation lowers the cost of divorce by replacing expensive lawyer hours with significantly less expensive mediator hours, and gives people settlements they are more willing to live with because they can't blame the mistakes on their lawyers, then it will be a noble achievement.

That is why I would like to see these questions answered. The answers given by the movement so far have been mere conclusory assertions. That is, no answers at all. To call them replies is to insult the intelligence of a whole profession. I keep hearing that the real answers are just around the corner. I am not hostile to mediation, but I am still waiting.

NOTES

*An abbreviated version of this presentation appeared in the ABA's Family Advocate.

1. See Coogler, Structured Mediation in Divorce Settlements, (1978).

2. For a comprehensive summary of the ethics opinions on mediation-related practices see Silberman, "Professional Responsibility Problems of Divorce Mediation". 7 FLR 4001 (1981). For a later opinion on the subject see the New York City bar association's expertly drafted advisory opinion at 7 FLR 3097.

3. Model Rules of Professional Conduct, Final Draft Rule 2.2 (1981).

4. See Pelham v. Griesheimer, 417 N.E.2d 882, 7 FLR 2403 (Ill. App. 1981); Md. State Bar Assn. Eth. Com. Op. 80-55A (1980), Informal Ethics Opinion, Md. Bar J., Jan. 1981, p. 8.

5. See Ore. State Bar Legal Eth. Com. Op. 70-46 (1980); N.Y. City Bar Assn. Com. on Prof. & Jud. Ethics Op. 80-23 (1981), 7 FLR 3097.

6. See Md. op., Note 4, supra; N.Y. op., Note 5, supra.

7. This is apparently the method contemplated in the influential handbook by O.J. Coogler, Structured Mediation in Divorce Settlements (1978).

8. See N.Y. op., supra; and Md. op., supra; Ore. State Bar proposed Op. 79-46 (1980); Boston Bar Assn. Op. 78-1 (1979). These prohibitions are in part a product of the present

Code of Professional Responsibility's EC 5-20, which says that no one mediating a dispute of any kind should afterwards represent a party in court. It was of course not written with divorce mediation in mind. The discussion below of a possible new rule assumes replacement of the CPR provision.

9. See Coogler, supra, at 123.

10. See Va. State bar, Op. of June 10, 1980. The New York opinion, by some complicated extrapolations from existing opinions, deduced that the mediation shops could come within the exceptions if they made no profits -- a very significant assumption.

CHAPTER TWO:

DOMESTIC VIOLENCE MEDIATION

Mediation: A New Remedy for
Cases of Domestic Violence

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INTRODUCTION

Should mediation play a prominent part in the resolution of disputes involving domestic violence? Unlike legal sanctions, mediation allows both parties to a dispute to attempt a cooperative resolution. A mediator, someone unconnected to the parties or their particular problem, works with them together and separately to identify important issues, minimize the retrospective placing of blame, stress potential areas of agreement, and build the desire to reach a settlement acceptable to both parties. In recent years mediation has been used increasingly to resolve interpersonal disputes. Improved response to domestic violence cases demands new techniques as well as improved applications of existing ones, and mediation is often mentioned as an important new remedy.

There are several reasons why mediation has attracted interest as a remedy for victims who have been assaulted or

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threatened by a lover spouse, parent or child. Mediation can be arranged and completed in much less time than can many legal remedies. Mediation not only provides a forum for the parties, but allows both of them to participate in formulating guidelines for the future. Although these guidelines may not have the power of a court behind them, they are likely to be adhered to because they were arrived at with the direct involvemnet of both parties. Finally mediation does not require the time of judges, prosecutors, and defense attorneys. Even though mediation may not be less expensive then court processing on a per case basis[1], it can make extensive use of volunteer workers and does not draw upon the scarce resources of the legal system.

We now have empirical evidence that permits inductions about the strengths and weaknesses of mediation as a solution for violent or threatening behavior between spouses, lovers, or close family members. This article will utilise the record of one program, the District of Columbia Mediation Service[2] (DCMS), as the basis for a discussion of mediation's effectiveness, its proper place in a set of legal and social service remedies, and why it should be made available to complainants in domestic violence situations.

The best evidence from the DCMS experience and from experiences at other mediation centers that have been evaluated[3] indicates that mediation can provide an effective remedy for many victims of domestic violence. "Effective" in this context means that 1) there is a greatly reduced likelihood of any further violence or threatening behavior; 2) the process is perceived as fair by both complainant and respondent; and 3) the process is no more time-consuming or costly than alternative remedies likely to be available for that class of dispute.

To say that mediation can be applied effectively to cases of domestic violence is not to say that any and every use of this technique will be successful. Advocates of mediation do not argue, for example, that cases of serious repeated physical abuse should be mediated. Nor may mediation be possible if the complainant, for whatever reason, is too fearful of the respondent to make his or her own decisions. The following discussion will assume that some cases are suitable for mediation while others are not. It is nonetheless important to note that there are no data to support this assumption. It is a normative judgment, based upon considerations of equity, our current knowledge of the mediation process, and common perceptions of the function of the criminal law. More experience with mediation programs may produce evidence that this judgment is too conservative.

I. Characteristics of the Mediation Process

Mediation is a commonly used label for any dispute resolution process in which a third party with no formal coercive powers intercedes to promote a voluntary settlement between disputants. Within this broad category a widely divergent group of mediation models has developed, varying according to the type of dispute being addressed, the nature of the client population, the method of client contact with the mediation service, the skills of the mediators, and the management needs of the program itself. Before discussing the particular mediation model employed by the District of Columbia Mediation Service, we should consider the salient characteristics of the mediation process as it is applied to interpersonal disputes involving domestic violence. Most programs share several basic features:

1) Mediation in this context should be considered a crisis-intervention technique. Regardless of the number or seriousness of prior conflicts, some recent event has precipitated mediation. A complainant may have become angry enough or desperate enoug[illegible] seek help, or the authorities may have initiated legal action against one of the parties. The mediation process, before it can do other things, must help resolve the immediate crisis and lessen the likelihood of a recurrence.

2) Unlike legal remedies, mediation is prospectively rather than retrospectively oriented and is not concerned with determining rights and wrongs. A discussion of past events and feelings by both parties is extremely important to the mediation process, but only because it enables an agreement to be reached about the course of future conduct. This approach is viewed unsympathetically by those who believe that legal sanctions are the most effective way to prevent future assaultive behavior. It will be shown[4], however, that there is a large class of cases for which legal sanctions are unlikely and/or inappropriate. It is for these cases that mediation offers its greatest promise.

3) Mediation is not therapy. Mediation's goal is to help effect behavioral change, because it is specific behavior--assaultive behavior or threatening behavior--that one or both parties cannot tolerate. Attitudinal change, that is, a change in one party's basic feelings toward the other, may be a prerequisite for some kinds of behavioral change, but it is not the paramount goal of mediation. Violent behavior may result from a complicated mix of psychological and situational factors. A workable mediation agreement must take into account existing feelings and life situations, but fundamental

personality or attitudinal change is not required to prevent many forms of domestic violence.

The limited scope of mediation may be a handicap, but it is also a great strength: the process requires the parties to focus on crucial rather than peripheral issues, and it allows little room for excuses. The parties are treated as responsible adults and in turn are expected to participate actively in the search for a mutually acceptable agreement.

4) Mediation is an informal, participatory method of conflict resolution. The mediator, a non-mythicized figure, has no higher authority to invoke, and rebuffs requests to make findings of fact or decisions about blameworthiness.[5] The setting and proceedings are not judicial in tone, but the mediator does insist upon certain ground rules, chief among them that each party listen to the other without interruption. Courteousness may not previously have been the parties' strong point; the mediation process is an exemplary one in that couples are shown at least a glimpse of a more respectful way to interact.

5) The process is participatory, but the nature of the participation is controlled by the mediator and may vary from case to case. Virtually every session begins with the parties

being together. Each person in turn tells their side of the dispute to the mediator. If the parties are unable to communicate with each other, the mediator may find it useful to work with them extensively in joint sessions to promote the acquisition of some communications skills. In most pppgrams, however, the mediator does most of his or her work in individual sessions with each party.

During this phase of mediation the mediator controls the flow of information between the parties and is able to elicit and discuss alternative solutions in ways that might not be possible if the couple were together throughout. This technique also has the virtues of minimizing disparities in power and allowing the mediator to probe the private feelings beneath the public statements of each party. A common misconception of mediation is that it is a three-way discussion that results in increased mutual understanding and better feelings, followed by a negotiated settlement. Although increased mutual empathy is promoted by the mediator, it appears that empathy can be achieved more surely and lastingly in individual rather than in joint sessions, particularly in emotion-laden domestic cases. Mediation is therefore cooperative in that both parties must consent to an agreement, but not in the sense that the parties do all of the work toward an agreement while together.

6) Mediation is to some extent a voluntary process, but one party may participate only because it is the least objectionable of several alternatives. The prospect of court action, or further police involvement, or retaliation from the other party, may have substantial coercive effect. To say that there may be strong pressures to cooperate is not to say that there is no voluntariness. We all make choices that are not autonomous but that we are free to reject. It is in this sense that mediation is voluntary; it relies both on coercive external pressures and on an individual's decision to participate.

7) Mediation relies on a rough parity in bargaining power between the parties to be successful. If one side dominates the other there is much less chance that any agreement will be truly voluntary or that it will accurately reflect the parties' needs. There is some sentiment that cases of domestic violence ought never to be mediated because there can be no equality of bargaining power between the parties. There is no doubt that in many cases this is true. A woman who has been victimized for years cannot participate as an equal in a discussion with an abuser whom she fears.

But in other cases the violence may not have been repetitive, or may be a relatively minor component in a complex set of problems. In any event the occurrence of violent behavior does not by itself mean that the victim is hopelessly disadvantaged, since he or she may still have sufficient personal strength to seek permanent change in a relationship. Absolute equality between people thus is not a prerequisite for mediation. A party who wishes may be accompanied or represented by a friend, relative, or even attorney, and a mediator who believes that the bargaining power held by one side is too disproportionate may decline to proceed with the mediation.[6] The holding of private sessions with each side helps to mitigate power differentials and safeguards a weaker party from direct pressure by the stronger. In fact, the entire mediation process is constructed so as to identify and protect the most important interests of each side. Observers of the Brooklyn Dispute Resolution Center commented:

> By encouraging disputants to "vent their spleen" and to retell past outrages perpetrated against them in the relationship, and by working towards new solutions to old problems, the mediators seemed to use the process to accustom disputants to articulating their conflicts and identifying their internal sources of emotional strength; this appeared to be of value particularly

to those whose self-esteem or ability to cope was at a low ebb, as in cases of domestic violence.[7]

II Mediation As A Remedy

Current discussion of the problems of domestic violence and what to do about them focus on legal and therapeutic intervention.[8] In fact, one common feature of writings on this subject is the use of the word "intervention," with its connotations of coerciveness and third-party decision-making. Law enforcement agencies and the courts have historically viewed domestic assault cases as annoyances, or have even actively avoided them. It is thus not surprising that reformers are concerned primarily about the welfare of victims and are suspicious of remedies that depend upon voluntary actions by assailants. This attitude is rooted also in a particular perception of the mentality of batterers:

> It is characteristic of batterers to deny responsibility for their abusive behavior, and to be unwilling to seek help. Also, batterers are often externally motivated and do that which is required of them more willingly than they take steps by themselves to solve a problem. Without a court order or the threat of prosecution, few batterers seek treatment; where counseling is an alternative to prosecution or is ordered by a court, a majority are receptive to therapy.[9]

The foremost goal of reformers is to devise programs to put an end to assaultive behavior once it has been discovered or reported. The means suggested generally fall into two categories: increasing the availability of treatment programs for batterers, couples and families, and improving the scope and efficiency of legal, principally prosecutorial, efforts. Included in the latter category are victim advocate programs and the use of civil protection orders or peace warrants to separate batterer and victim. Mediation has been seriously considered as an alternative only recently.[10] Some advocates of increases efforts to reduce family violence, however, have deprecated mediation's potential as a technique for reducing assaultive behavior and protecting the interests of victims.[11] Mediation is of limited use, it is argued, because: 1) it is a simple process while the etiology of assaultive behavior is complex; 2) mediation depends upon voluntariness from a respondent who is presumed to have no interest in the well-being of the complainant, and; 3) mediators have no authority to compel a batterer to do anything. Thus, the argument goes; mediation is "toothless" as a remedy.[12]

Unfortunately, much of the discussion about remedies for domestic violence assumes a single paradigm: the repeated serious physical assault of one spouse (the victim) by another (the batterer) over an extended period of time, that occurs without causing the permanent dissolution of the relationship. It is understandable that concern should focus on this type of case; the harm being done and the potential for further violence are great. There should be little disagreement that the most direct and forceful intervention by the legal system is required to prevent further injury. The danger in designing remedies only for this worst-case example is that programs may be ill-suited for a very large number of cases in which the physical harm is less severe, or the pattern of assault is not well-established.

In many instances violence will flare between a couple when it has not occurred before, or has occurred only rarely. The current relationship may be in crisis, may in fact be ending, but the parties will continue to have some involvement with each other. Neither party may wish to punish the other, but the complainant may be ready to pursue a legal remedy if there is no other way to resolve the situation. The chances of their developing a long-term abusive pattern of behavior may not be great, but in some cases this is a real possibility if the parties' behavior does not change. In these circumstances swift intervention is necessary, but it does not have to be intervention by a court to be effective.

Actual cases are the best illustration of situations for which mediation offers a better solution than traditional legal remedies. The following case descriptions were made by intake interviewers at DCMS after speaking with complainants. They are reproduced verbatim. In each case C, complainant, is a female; R, respondent, is a male. In the first case the couple had had a relationship for several years, but were not living together:

> C and R have known each other four years. On 3-15-81 R spent the night with C then left to visit a female friend. Later returned and a fight started with R beating C. C sent to Capitol Hill Hospital. Bruised but nothing broken. Given pills for pain. Last time a fight started R choked C. C wants R to stay away from her. C is uneasy about R coming to home yesterday to repay a financial debt. R brought an ex-con with him. C thinks there might be some retaliation through this ex-con. C changed lock. R carries a gun. C wants record albums back.

Through mediation the parties arrived at a written agreement that included promises by the respondent to return certain record albums, pay for medial bills that the complainant incurred, and refrain from any physical violence in the future.[13]

In some instances it is the breakup of a relationship that triggers violence or the threat of violence:

> C and R lived together for six months. Separated 4-20-81 (apartment is in C's name). They have two children. C told R he had to leave her apartment because the relationship was over. R became upset and broke living room window. Once inside he took a knife and cut up all C's clothing and shoes, busted speakers on record player, broke door mirrors and destroyed pictures of C. C says "The relationship is over" and she only wants him to see the kids. There have been prior problems where R has beaten on C and threatened her. C says "When R drinks he gets out of hand." C wants R to return the telephone taken from the apartment.

The written agreement in this case formally acknowledged the end of the relationship and provided detailed rules governing the respondent's rights to visit his children.[14]

The final example concerns a married couple who had no plans to separate, but whose relationship was becoming increasingly unstable:

> C and R married 13 years, three children. On 4-25 C came home from work--R had bolt locked the door--she couldn't get in. C called R from police station; R

> hung up on her but had opened the door when she went to the house after calling. When C got inside, R accused C of taking $100.00 from him, threatened to harm her, and attempted to hit her. On 4-26 R again accused C of taking money and slammed the door on her . . . C is here primarily to keep R from hitting her.

The husband signed an agreement promising his wife not to physically harm her or the children and not to lock the door when they were gone from the house. The wife agreed to talk with her husband about all matters provided that he had not been drinking.[15]

As these cases illustrate, "domestic violence" cases cannot be treated as if victims and batterers belong to homogeneous groups. If cases of domestic violence differ in the seriousness of the actual or threatened harm, and in the personal resources available to the parties, then it is a fallacy to presumesthat if these cases are not mediated they will or should be prosecuted. For these are precisely the kinds of cases for which prosecution may be too draconian a remedy. These are also just the sort of cases that promise prosecutors a high attrition rate: the specifics of any charge will be difficult to prove without the complainants's cooperation, and it may not be in the complainant's perceived self- interest to cooperate if as a result the respondent is

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jailed, placed on probation or required to attend counseling sessions.

What every complainant does want is a change in the current pattern of behavior between him or her and another person. If this change can be accomplished quickly, in a manner that respects the complainant but does not brand the respondent as a criminal, then everyone benefits. Does the mediation process accomplish these ends? In order to answer this question we must consider others that are raised by the sample cases described above. First, how is it assured that appropriate cases will be mediated while more serious or intractable cases are handled by prosecution or other means? Mediation programs can accomplish this differentiation by developing careful guidelines for intake or referral of cases, and by making other remedies available concurrently. At DCMS, for example, no case of domestic violence will be mediated if 1) the victim has suffered serious injury; 2) a gun was used to threaten the victim; 3) the violent behavior is repetitive; or 4) there does not appear to be sufficient parity of bargaining power between parties.[16] And at DCMS a complainant who elects to pursue mediation may also make use of other legal or therapeutic services available on the premises or by referral.[17]

Even if the victim's injuries were not serious and there has been no lengthy history of physical abuse, the situation may be a fearful, anxiety-laden one requiring change if worse events are not to follow. How can a brief written agreement, which often does not appear to address directly the most crucial points noted in an intake interview, provide lasting help? To answer this question requires a brief description of the DCMS mediation process as it is used to settle interpersonal disputes.

III The DCMS Process and Its Results

Mediation by the DCMS is one remedy among a number offered to clients at the District of Columbia Citizens' Complaint Center (CCC). In some jurisdictions anyone may initiate a prosecution by obtaining a summons; in the District of Columbia only prosecutors may issue warrants. CCC was established as the place where citizens could make complaints that might cause criminal warrants to be issued or that might result in the initiation of a civil protection order, particularly in intrafamily cases.[18] In 1980, 9889 men and women came to CCC to file complaints about husbands, wives, neighbors, lovers, parents, and children. An intake worker speaks with each complainant and, depending upon the nature of the case, suggests one or more remedies.

1) The case may be referred to a prosecutor (the U.S. Attorney in the District of Columbia) for "papering" or the issuance of a warrant

2) the prosecutor may hold a hearing at which the parties are heard and then are admonished to obey the law;

3) the corporation counsel (the city attorney with jurisdiction over civil and minor criminal matters) may petition the court for a civil protection order preventing the respondent from having certain kinds of contact with the complainant;

4) the corporation counsel may send a warning letter to the respondent;

5) the complainant may receive counseling from a professional at CCC or may be referred to an agency outside CCC for other services (a shelter for battered women, for example);

6) the case may be scheduled for mediation. This will happen if, in addition to meeting the guidelines on violence discussed earlier, the case involves parties with an ongoing relationship. There must be rough parity of bargaining power, and both parties must consent to participate in mediation.

Not all jurisdictions with mediation programs offer this particular mix of remedies, nor is it common for the remedies to be located under one roof. The complainants may be referred to a mediation service in several other ways; for example, cases may be sent for mediation after prosectuion has been initiated. In such a program respondents are under direct and heavy pressure to participate. Most mediation programs do share an allegiance to the process described in the preceding section[19] in which a single session is used to develop a written and/or oral agreement to which both parties assent.

At DCMS, if the complainant is willing to try mediation a staff member contacts the respondent, determines whether he or she agrees to participate, and schedules a hearing date and time. Two mediators are assigned to the case (occasionally scheduling permits only one mediator). Once the hearing is completed and an agreement signed, mediators have no further responsibility for or involvement in the case. If no agreement is reached the parties are left to their own devices, except of course that any remedies being pursued concurrently at CCC continues.

Two months after each mediation hearing a DCMS staff member makes four attempts to contact each party by telephone.[20] Contact is made regardless of whether an agreement was reached or not. If the complainent or respondent can be reached by telephone the staff member asks a series of questions in a conversational tone about the mediation hearing and its consequences. Some of the questions inquire about the parties' reaction to the hearing itself: Were they satisfied with the hearing? Was it conducted fairly? Were both sides allowed to say everything of importance? The staff member also asks whether the agreement, if there was one, was satisfactory and whether more problems developed after the hearing. If there were further problems, what was their nature? Both sides are asked whether they have kept their end of the agreement, and whether the other side has or has not done the same. Finally, the staff member asks the parties about their level of satisfaction with the entire experience at the Citizen's Complaint Center. DCMS uses its follow-up process to judge mediation's relative effectiveness with different types of cases, to spot weaknesses in the conduct of hearings that may be affecting the stability of agreements, and to learn of conduct by staff or mediators that may be adversely affecting clients' satisfaction with the service.

A recent summary of follow-up data from the six-month period of August 1980 through January 1981 reveals two noteworthy characteristics of domestic cases involving assaults or threatened assaults. First, parties in these cases do not differ significantly in their satisfaction with mediation or in the success of their agreements from disputants in domestic cases generally or from disputants in all nondomestic cases.[21] This suggests that domestic/assault cases are not less suitable for mediation than other interpersonal disputes, at least as they are screened at SCMS. Second, in absolute terms, the data show a high proportion of mediated agreements being adhered to at least two months after hearings were held.

An examination of the responses to individual questions reveals other interesting patterns. Both complainants and respondents, for example, reported similar feelings about the mediation process itself.[22] When asked about the outcome of the process, similarly high percentages of complainants and respondents reported that they were satisfied or partially satisfied with the mediation agreement.[23]

Two months after a mediation hearing had taken place, more than three-quarters of the participants contacted stated there had been no further problems. (Some of these people had had no contact with the other party.) Of the problems that did arise and which could be identified, four complainants reported further assaults, and four others complained of harassment.[24]

An important measure of a mediation agreement's success is the degree to which its terms are being upheld by the two sides. Both complainants and respondents were asked whether they had kept the agreement, and whether the other party had kept it. It is not surprising that a high percentage of participants reported that they themselves were upholding an agreement; more interestingly, over 70 per cent of complainants and 80 per cent of respondents told mediation staff the opposing party was keeping the agreement.[25]

Finally, DCMS asked parties about their general level of satisfaction with the way they were treated at the Citizen's Complaint Center (CCC), of which DCMS is a part. More than 80 per cent of complainants and respondents said they were satisfied with services at CCC. Ninety-four per cent of the former group and 85 per cent of the latter stated they would contact CCC about a similar problem if it arose in the future.[26]

IV Conclusion

The results obtained at DCMS are consistent with those obtained from recent evaluations of the Atlanta[27], Kansas City[28], and Venice/MarVista[29] neighborhood justice centers and of the Brooklyn Dispute Resolution Center[30] Participants reported a high degree of satisfaction with the mediation process and its outcome, a response that was consistent for all case types.

There is evidence that the more serious cases, particularly domestic cases with a pattern of calls to the police, were more likely than other case types to result in futher contact with the criminal justicesystem.[31] This fact by itself tells us nothing about mediation's suitability for domestic violence cases, beyond the truism that difficulty, protracted, emotional disputes are harder to find solutions to than simpler ones. Proper case screening may make an important difference in "recidivism" rates; this is one reason why DCMS routes serious cases to prosecution.

Another lesson suggested by the data is that for more serious cases mediation "might be more effective if it were made the first step in a sustained series of interventions."[32] It is common for mediation programs to refer clients to other available social and legal services. What remains a fertile field for experimentation is the design of a truly integrated program in which mediation is a precursor of or an accessory to individual or family therapy. Unfortunately, therapeutic intervention generally depends for its effectiveness upon the voluntary participation of individuals. Many of those involved in domestic violence cases simply will not choose therapy or counseling when they are offered. The challenge will be to use mediation in a way that is most supportive of other services.

The positive responses of parties to mediation should warn against making several assumptions: that all cases of domestic violence are equally serious; that if mediation is less successful with these cases than with simpler disputes it is an inappropriate remedy; that a process lacking coercive power is *ipso facto* more detrimental to the victims of violence than alternatives; and, that if cases are not mediated, they will be prosecuted. This last assumption is especially pernicious because it is contrary to the facts in most jurisdictions, where only a very small proportion of complaints of domestic violence result in criminal prosecution. It is contrary as well to the interests of many victims.

There is no quarrel with the desire to prosecute rigorously in instances of serious physical abuse. But there is a great need across the country for an effective response to conflicts between spouses or lovers that involve violence that is not yet serious or protracted. Victims may be uninterested in prosecution not only out of fear, but also out of love, or economic concerns, or consideration for children. That these cases may be more diffiuclt to mediate successfully than others does not mean they should be prosecuted.[33]

Victims also have an interest in a remedy that is speedy, humane, and does not make burdensome demands on their time. Both the Neighborhood Justice Center evaluation[34] and the study of the Brooklyn Dispute Resolution Center[35] conclude that mediation can operate more quickly, in a manner more satisfying to both disputants, than can court proceedings. This does not necessarily mean that mediation costs less per case than court processing. Fluctuations in caseload size and the large number of other variables involved have made cost/benefit ratios difficult to compute. Evaluators have not yet been able to assign "a monetary value to the rather dramatic positive effects mediation had on the perceptions and attitudes of disputants whose cases were diverted from the court process."[36]

There is growing interest in establishing local mediation services to resolve a variety of interpersonal disputes. If cases of domestic violence are to be among the disputes mediated, experiences at DCMS and other pioneer programs can provide guidelines for an effective remedy. These experiences suggest that a mediation program should adhere to several essential principles:

1) Whatever case intake method is used must provide for careful screening of complaints. Those cases suitable for mediation should be identified and preserved, and others should be referred to appropriate legal or social agencies.

2) Mediators, whether volunteers or professionals, must be carefully selected and trained, and their performance must be monitored to assure continued provision of high-quality services by the program. One proven way of helping to accomplish the necessary monitoring is to assign two comediators to each dispute. Mediators will then receive criticism and suggestions about their performance as a normal part of their work.

3) Mediation must include, at a minimum one private individual session between the mediators and each party. This is essential in domestic violence cases to discover and incorporate into the agreement the true feelings and interests of each side.

4) Mediation must be timely. Although no absolute period exists beyond which mediation will be ineffective, it is clear that the degree of the clients' satisfaction depends upon a relatively short wait between contact with the program and the conclusion of mediation.

5) Program staff must conduct systematic follow-up interviews with at least a sample of disputants to learn their feelings about the mediators, the process and, most importantly, the agreement and its durability. This information is needed to identify problems and make necessary progam alterations, and also to provide a means of comparing the cost and effectiveness of mediation with those of other remedies.

6) Mediation should not be an exclusive remedy. In some cases other legal remedies, such as prosecution or protective orders, may be appropriate in addition to mediation, and one or both parties may need some type of counseling or other service. A mediation program will best serve its clients as one of an

array of resources that can be tailored to the circumstances of each case.

7.) The mediation program must deal forthrightly with the issue of coercing the respondent. Mediation is in theory a voluntary process, albeit one in which a party participates because the cost of not participating is too high. But if the alternative to mediation is criminal prosecution, this coercive element should not be disguised and the respondent should not be treated as if he or she is not under substantial external pressure to cooperate. At the same time the programs should not mislead any participant by suggesting, even subtly, that sanctions will be applied upon a refusal to mediate if this is in fact not the case.

Mediation is a promising technique because it is "quick, responsive, and humanistic--a powerful and, one suspects, increasingly rare combination in the lives of many citizens."[37] Early indications are that many domestic conflicts, even those with some elements of violence, can be successfully resolved if a mediation program is well-designed and managed. The promise mediation offers is to improve the choices available to victims and relieve the judicial system of cases not suitable for prosecution, in a timely and humane manner. Further experimentation should help increase our ability to select suitable cases for mediaton and integrate programs with existing social and legal services.

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1. The final evaluation of three neighborhood justice centers offering mediation of a variety of interpersonal disputes concluded that: "Reliable analytical data are not yet available on the costs of processing cases through Neighborhood Justice Centers as compared to court processing costs; however, available data indicate that NJC costs for at least some cases may become competitive with the courts. *Office of Program Evaluation*, *National Institute of Justice*, *U.S. Dept. of Justice*, *Neighborhood Justice Centers Field Test--Final Evaluation Report* 107 (1980) (hereinafter cited as *NIJ*).

2. From August 1980 through April 1981, DCMS processed 1,269 cases, or an average of 141 per month. Of the total number of cases handled during this period, an agreement was reached prior to or during a hearing 612 times. Although directly comparable figures from other programs are not available, the caseload at DCMS appears comparable to or slightly larger than that of other large mediation programs, such as those in New York, Atlanta, Houston, and Honolulu. For addresses of these programs, see notes 27-30, *infra*.

3. *See NIJ*, *supra* note 1; *Vera Institute of Justice*, *MEDIATION AND ARBITRATION AS ALTERNATIVES TO PROSECUTION IN FELONY ARREST CASES--AN EVALUATION OF THE BROOKLYN DISPUTE RESOLUTION CENTER* (1980) (first year) (hereinafter cited as *Vera*).

4. *See* discussion at text accompanying notes 12-13, *infra*.

5. In some programs mediators are empowered to arbitrate impasses and obviously enjoy some measure of additional authority as a result. At the Brooklyn Dispute Resolution Center, for example, the parties agree in writing to mediation/arbitration. If mediation is unsuccessful, a mediator may render an award that is enforceable under local statute, just as a labor-management arbitration award would be.

6. Unfortunately, prosecution may not be a real alternative in such cases. Unless there has been a recent incident and evidence concerning it is available, a battered woman may in effect be asked to wait until she is victimized again before the legal system will help her.

7. *Vera*, *supra* note 3, at 46.

8. *See generally*, Lerman, note 9, *infra*.

9. Lerman, *Criminal Prosecution of Wife Beaters*, *Response* 11-12 (Jan.-Feb. 1981).

10. The Columbus, Ohio, *Night Prosecutor Program*, begun in 1971, was one of the first local programs that attempted to mediate some kinds of interpersonal disputes. Encouraging data from this and other early programs helped persuade the Justice Department to fund a test of the "neighborhood justice center" concept in 1977. In the mid-to-late 1970's dozens of mediation projects were begun across the country, varying in their organization, funding, scope, and ties with the courts. Those programs that attempt to deal with disputes that are referred from the criminal courts or that arise through an allegation of criminal conduct cannot avoid cases of family violence.

11. Lerman, *supra* note 9, at 16-17.

12. *Id.* at 16.

13. The agreement stated: I, Spencer W., agree to return all record albums and one tape of Aretha Franklin, Amazing Grace. I also agree not to hit or choke Ms. M. anymore. While under the doctor's care whatever hospitalization does not cover, Mr. W. will

pay for. This includes doctor visits and prescriptions.

14. The agreement stated: I, Barbara M., and I, Darnez S., hereby agree to end the relationship that has existed between us. I, Barbara M., will continue to live at my mother's house and I, Darnez S., will continue to live at my mother's house.

We further agree that our two children--Martin M. . . . and Larry M. . . . will be able to visit their father at his mother's home one or more weekends a month. We agree to talk over the telephone to arrange specific dates. The children will be delivered to Mrs. Laura S's home on Friday evening by Barbara M. or a relative, and will be picked up Sunday afternoon.

I, Darnez S., agree to return a telephone to Ms. M. which she can pick up at my mother's house as soon as tomorrow.

15. The agreement stated: I, William S., agree that I will not physically harm in any way my wife, Rita S., or my three children, Daryl, Roger, and James.

I, Rita S., agree that I will talk and communicate with Mr. S. on any subject provided Mr. S. has not been drinking when he approaches me.

16. DCMS does not provide more specific written guidelines for mediation, but relies upon the CCC intake-interviewing process for appropriate case selection. An intake worker, who has been thoroughly trained, discusses the details of a case with the client and suggests mediation if it seems appropriate and if the client is willing. The intake worker has a detailed set of prosecutorial guidelines and, if these apply, the case is referred to the U.S. Attorney's representative at CCC.

17. Other mediation services are not so closely affiliated with the local prosecutor's office and do not offer as many client services under one roof as does DCMS. However, any mediation service can and should develop a method of referring clients to appropriate social agencies, and of working with the prosecutor's office to assure that appropriate cases flow from that office to mediation.

18. The District of Columbia Code requires that the

United States Attorney, the Director of Social Services of the D.C. Superior Court and the Corporation Counsel cooperate in the disposition of intra-family offenses. *D.C. Code Ann.* §§ 16-1001 through 16-1006 (1981). In response to this legislation, passed in 1970 as Section 131(a) of Pub.L. No. 91-358, the three agencies organized the Citizen's Complaint Center.

19. *See* text accompanying notes 13 through 15, *supra*.

20. Admittedly this procedure procedures only the responses of those who can be reached by telephone, but the small size of the the DCMS staff necessitates using this method.

21. *Institute for Social Analysis, District of Columbia Citizens' Complaint Center Mediation Service Feedback Report* 5 (Oct.-Nov. 1980).

22. 1) Satisfaction with hearing:

	Satisfied	Partially Satisfied	Dissatisfied
C	63 (80%)	10(13%)	6 (8%)
R	41 (80%)	9 (18%)	1 (2%)

2) Was the hearing conducted fairly?

	Yes	No	Partially/ Somewhat
C	74 (90%)	1 (1%)	7 (9%)
R	48 (92%)	2 (4%)	2 (4%)

3) Were you allowed to say everything?

	Yes	No	Partially/ Somewhat
C	77 (95%)	0	4 (5%)
R	48 (98%)	0	1 (2%)

23. 4) Satisfaction with the agreement:

	Satisfied	Partially Satisfied	Dissatisfied
C	57 (80%)	11 (15%)	3 (4%)
R	39 (83%)	3 (6%)	5 (11%)

24. 5) Have there been more problems?

	Yes	No	No Contact/ None
C	19 (24%)	49 (62%)	11 (14%)
R	12 (24%)	31 (61%)	8 (16%)

6) Nature of further problems:

	Assault	Harrassement	Non-Payment	Child Custody Visitation	Property	Relationship
C	4 (24%)	4 (24%)	3 (18%)	5 (29%)	0	1 (5%)
R	0	2 (29%)	0	3 (43%)	1 (14%)	1 (14%)

25. 7) Has the other party kept the agreement?

	Yes	Partially	No
C	51 (73%)	4 (6%)	15 (21%)
R	43 (86%)	1 (2%)	6 (12%)

8) Have you kept the agreement?

	Yes	Partially	No
C	51 (96%)	0	2 (4%)
R	37 (93%)	1 (3%)	2 (5%)

9) Satisfaction with CCC services:

	Satisfied	Partially Satisfied	Dissatisfied
C	64 (81%)	9 (11%)	6 (8%)
R	40 (87%)	3 (7%)	3 (7%)

10) In the future, will you contac CCC (about a similar problem)?

	Yes	No	Maybb
C	77 (94%)	3 (4%)	2 (2%)
R	45 (85%)	4 (8%)	4 (8%)

27. Neighborhood Justice Center of Atlanta, 1118 Euclid Avenue, N.E., Atlanta, Georgia 30307.

28. Neighborhood Justice Center, American Bank Building, 1 West Arbour Boulevard, Kansas City, Missouri 64111.

29. Neighbor Justice Center, 1527 Venice Boulevard, Venice, California 90291.

30. Brooklyn Dispute Resolution Center, 50 Court Street, Brooklyn, New York 11201.

31. See NIJ, supra note 1, at 93; Vera, supra note 3, at 63-64.

32. Vera, supra note 3, at 65.

33. Because of their relatively low interest in punitive

outcomes and relatively high interest in relief from harassment, complainants with strong ties to defendants may bring cases which are particularly suitable for diversion from the court. That their cases also tend to involve histories of hostilities with the defendants further suggests that an overburdened court may have particular difficulty resolving them successfully. *Vera*, *supra* note 3, at 37.

34. *NIJ*, *supra* note 1, at 105-106.

35. *Vera*, *supra* note 3, at 64.

36. *Vera*, *supra* note 2, at 69.

37. *NIJ*, *supra* note 2, at 91.

The Role of Mediation in Domestic Violence Cases

Suzanne Goulet Orenstein
The Salem Mediation Program

It is generally recognized that the victims of domestic violence must be given immediate protection by the police and the courts[1] like the emergency restraining orders that are available on a 24 hour basis in Massachusetts. These orders are designed to insure the victim's immediate physical safety. However, even when a judge makes provisions for custody, visitation, and support, there is a high potential for further conflict.

In part, this continuing strife is due to the high level of anger between the parties, which an appearance in court does little to assuage. By their very nature, court proceedings are brief, formal, and narrowly focused, giving the parties little opportunity to express their feelings or the full range of their needs.

In addition, the restraining order, no matter how specific, cannot cover the range of issues that the couple will jointly face, whether or not they live together in the future. This is particularly true for those with children.

Also, a judge's decision is often viewed by one of the parties as biased against them, which produces resistance to the imposed solution. As one husband in our caseload put it: "If the state can throw me out of my home, the state can pay for my children's support." More realistically, this husband may hesitate to violate the support order for fear that he will be jailed. However, his resistance may express itself in other areas, such as a conflict with his wife over where he should wait when picking up the children. Displaced resistance to the imposed solution often results in repeated appearances before the judge.

Finally, domestic violence involves a peculiar mix of dependency and alienation on both sides. These mixed feelings create inconsistency in the couple's future contacts, which leads to further conflict. And when couples reunite, as they often do,[2] unless they have developed new decision-making patterns, conflict is likely to be rekindled.

In the Salem Mediation Program, we have found that mediation is a valuable complement to the victim protection that courts offer. Mediation can reduce the levels of anger and create a mutually agreed-upon plan for the forseeable future to which both sides are committed because it has been jointly developed rather than imposed. Mediation can also serve as a model for nonviolent problem solving and as a resource in the event of future conflict. In this paper, we will describe the types of protection that Massachusetts' courts offer in domestic violence cases, present a general description of the Salem Mediation Program, and examine data on 100 program cases that involved domestic violence.

The Abuse Prevention Act

The 1978 Massachusetts Abuse Prevention Act provides a civil procedure by which a victim of family violence may seek immediate relief from any local court. The Act defines abuse as "the occurrence of one or more of the following acts between family and household members: (a) attempting to cause or causing physical harm; (b) placing another in fear of imminent serious physical harm; (c) causing another to engage involuntarily in sexual relations by force, threat of force, or duress."

A victim of abuse by a spouse, co-habitter, blood relative, or ex-spouse may approach a district, probate, or superior court, or may, through the police, contact a judge after court hours, and petition the court to order the offender to meet one or all of the items covered by the law: s/he must, if ordered, refrain from abusing the plaintiff, vacate the household, forfeit custody of minor children, pay support for minor children, or pay damages for abuse alleged. Any and all of these orders may be issued on an emergency basis without notice to the defendant, for the duration of an initial five day period, after which both parties may appear and the orders may then be extended for a definite period of time, usually three months to one year. The orders expire if the plaintiff does not appear for the scheduled hearing on the continuance date set at the previous appearance, or if the judge does not allow the orders to be continued for some other reason.

Orders under the Abuse Prevention Act are called 209A petitions and violation is a criminal offense which can also be considered an incident of civil comtempt. Violation of a 209A order is also specifically included in the state's criminal trespass code. Copies of the orders are delivered to the police department of the town in which the parties reside, and the local police not only serve notice to the defendant that the order has been issued, but also assist the defendant in leaving the premises without further violence, and insure that the defendant does not return to the household while the order is in effect.

The major impact on domestic violence cases of this legislation has been to equalize the power between the victim and the abuser, who is usually the financial support or the perceived head of the household. Women can secure immediate relief from an abusive situation with some protection from retaliation, and the impact of their taking charge of their own safety can be most emphatically understood by an abuser who is suddenly told to vacate the household and make other arrangements with no reconsideration by the court for five days.

There have been some problems encountered by victims, primarily around financial support, police department confusion and because the victim may disregard the order once the message has gotten across to the abuser. Fortunately, orders are readily obtained again if they have been allowed to lapse, and even the threat of obtaining another order may give the victim considerable control over the marital conflict.

As we have already emphasized, abuse victims need immediate protection to insure their physical safety, which 209A's provide. However, once a victim has used the law, their relationship has not only been altered by the violence that has occurred but also by the restraining order. How do they now make decisions about all of the situations that may arise, and which are unforeseen, when they appear before a judge? How do they settle future conflicts? If the victim and the abuser were simply to stop all contact, few issues would be critical. However, many couples have children, which necessitates further contact, and many are unsure that they want a permanent disruption in their relationship. Whether or not they will ever again live together, the couple needs help in developing new ground rules for a non-violent relationship in the immediate future, which we believe mediation can provide.

The Salem Mediation Program

In March 1979 the Salem District Court received a federal grant to operate an alternative dispute resolution program. The program requires two full-time staff and a pool of lay mediators to direct criminal and civil cases involving parties who know each other toward non-legal resolution. The program office is located within the court serving the same jurisdiction, which includes eight cities and towns with a population of 125,000.

The program mediates about 150 cases per year, each case involving an average of three persons. Eighty-eight percent of the cases result in written settlements, which are then monitored by the program staff for ninety days. We find that 85% of the agreements are upheld for the ninety days. Typical cases involve spouses, neighbors, landlords/tenants, parents/children, co-workers, co-students, co-habitors, merchants/consumers, in-laws, and a few parties who have little prior relationship.

About half of the cases are the result of criminal complaints initiated by private citizens, which are then referred by the clerk-magistrate's office. Another 20% are referred by the judge or district attorney when the case comes before the court. About one-third of the cases are referred by defense attorneys, probation officers, social service agencies, and police departments. Criminal charges range from harrassment, threats, and assault and battery, to trespassing and malicious damage to personal property. About 25% of the referred cases are never mediated because one or both parties refuse, or the case is settled without court or mediation action.

Mediation sessions are conducted within ten days of referral by teams of two lay mediators, supervised by a staff person. Sessions last from two to several hours. Mediators are trained through 40 hours of demonstration, instruction and role play, with additional in-service training three times per year on special topics such as the emotional and legal process of marital separation, mediating highly emotional disputes, and district court procedures. Mediator training and supervision is essential for providing high quality services.

Mediation is a concept which everyone seems to understand intuitively, but which refers to actual processes that vary greatly. The Salem Mediation Program uses techniques of conflict resolution that were disseminated by the Dorchester Urban Court and the Institute for Mediation and Conflict Resolution. The overriding principles governing this mediation are:

1. Mediation is a process which assists disputants to take responsibility for the solution to the conflict. It must be undertaken voluntarily, and all information about the conflict and about potential resolutions must be elicited from the parties. No party may be coerced into agreeing to a settlement which they are not willing to live with.

2. Mediation is not therapy, but is problem solving for the foreseeable future. However, the parties have the opportunity to express their feelings both in joint sessions and in private sessions with the mediators to allow full disclosure with dignity. Mediation does involve exploration of some deep emotional issues, especially between parties with close or intense relationships, and mediators must be skilled in eliciting such feelings.

The Salem Experience With Domestic Violence Cases

Prior to undertaking an examination of our domestic violence caseload, the program staff made certain observations about those cases. We felt that:

A. parties in disintegrating relationships need assistance in redefining the extent and conduct of their relationship during a separation period;

B. practical issues of support and visitation are what people usually are first concerned about, and are the issues that lead them into mediation. Those are also the issues that are brought up first during mediation sessions. However, if they are to be resolved, the parties must come to a more basic understanding of the status of their relationship. The role of the mediator is often to help the parties focus on this fundamental question before practical issues can be effectively addressed;

C. in our experience, many couples had tried traditional counselling or therapy prior to reaching the court and mediation. Often, these couples did not wish to return to the therapist they had seen, suggesting that a different approach focusing on immediate circumstances should be tried;

D. finally, in comparison to the rest of our caseload, domestic violence disputes are more time-consuming for both staff and mediators, and the resulting agreements more fragile.

To more effectively review our domestic violence cases, a study of the program's first 100 cases that involved spouses, co-habitors, boyfriends/girlfriends, former spouses, and former boyfriends/girlfriends was undertaken. All data are drawn from program records, which provide reliable information on a small number of variables. Information on every variable is not available, especially when the case did not reach the point of a mediation session.

These 100 cases were referred during a thirty month period between April 1979 and November 1981. They included 14 % of the program's total referrals, and 15% of the mediations. In the larger caseload, 63% of the referred cases reached mediation sessions. In domestic disputes, 75% reached mediation sessions.

Referral Source and Court Status

The mediation program receives referrals from many sources, with the majority coming from the entry point for criminal processing, the clerk-magistrate's office. 209A cases are not referred from their entry point, but are always brought before a judge immediately, and mediation referral occurs after the judge has heard the case and issued the order, or otherwise ruled on the petition. The program received 67 referrals from the judge, but also received 19 referrals from the clerk magistrate on criminal proceedings which did not involve decisions about restraining orders, but did involve conjugal couples. The remaining 14 cases were referred from the prosecutor's office(6), the battered women's shelter(5), were self-referred(4), from probation(1), from police(1), and from other agencies(5).

Overall, 58 cases involved parties who had 209A orders pending, with 38 of those 58 being referred by the judge on the day of the five day hearing. This is the first time the defendant appears in a 209A case, and it is at this point that many defendants express their opposition to the order or to its terms. In many instances, the judge's response to this opposition is to continue the order for a brief time (two weeks) and refer the case to mediation.

In addition to the 58 cases with 209A orders, there are 34 cases in our sample for which we have data regarding criminal charges, and 31 are cases in which there is evidence of violence or evidence of preconditions of violence, such as threats, disorderly conduct, harassment and malicious damage. Thus virtually all of the cases of domestic disputes being seen by the mediation program involve domestic violence and we will include all of the 100 cases seen by the program in the discussion that follows, regardless of the actual charge in the case.

As Strauss, Gelles and Steinmetz showed in their nationwide study of family violence, there is a strong relationship between the amount of family conflict and the % of spouses seriously assaulted. The authors conclude that "it is as though people are able to withstand a considerable amount of conflict, avoiding violence up to a certain point. Then all hell breaks loose."[3] Cases which reach the court typically involve numerous conflicts between couples, and are close to or past the point where "all hell breaks loose." For this reason, all court cases between couples must be given preventive and protective attention.

Willingness to Mediate

The Salem Mediation Program requires that both parties agree to mediation. In our entire caseload, about 25% refuse, but in domestic violence cases refusals are less frequent.

In 209A cases, 92% (n=58) agree to mediate after speaking with the program staff. In non-209A cases, 74% agree. One reason for this difference is that 209A's are referred to the program by a judge while he is on the bench, so that one or both parties may feel required to participate. However, once they are in the program office and speak to the mediation staff, it is emphasized that their participation is voluntary. Nevertheless, most parties request that a mediation be scheduled. Their comments at this point frequently indicate that they feel a very immediate need to clarify the effects of the order on their relationship, so that our sense is that coercion by the court is not a major factor.

In addition, when mediations are scheduled, parties in 209A cases are more likely to appear for the sessions - 81% vs. 65% for our other domestic cases. These patterns suggest that the uncertainty of the new relationship created by a restraining order makes the parties particularly open to a procedure like mediation.

Living Arrangement

In Massachusetts, 209A's tend to be used by people who live together, while criminal complaints are used by those living apart. Thus in our mediation caseload, 19% of the non-209A cases (n=34) are divorced couples, 14% are boyfriends/girlfriends who never lived together, and 21% are

are couples who had been separated over three months. Only a fifth are people who had separated less than five days prior to the referral. In contrast, among the 209A's (n=58), less than 2% are divorced couples, and there are no people who had never lived together; only 9% had been separated more than three months, while 45% were separated less than five days, and most of the others just a little more than five days. The typical 209A case involves a couple that has recently been split apart by family violence, while our other cases involve a more continuing type of violence in which couples have not lived together for some time, but one or both parties has never come to terms with this arrangement.

Intake Issues and the Resulting Agreements

One reservation which many victim advocates express regarding the use of mediation in domestic violence cases is that many women - victims - will be coerced, however subtly, by their mate or by the mediators into resuming an abusive relationship, or forfeiting the financial rights they may have obtained in a court proceeding.[4] In our area, shelter staff and court personnel have observed that women victims frequently resume their relationship with the abuser, regardless of the assistance provided to them. Since the immediate outcome of mediation is a written plan of action that is developed by the parties, victims may agree during mediation to resume the relationship, perhaps making the reconciliation dependent on such things as counselling or behavior changes.

However, reconciliation is not a frequent outcome of mediation. Among the 75 mediated cases in our sample, the most common resolution sought by men during their intake interview is reconciliation (45%). In contrast this was mentioned by only 4% of the women. However, in 67 agreements developed, only 9 called for reconciliations or trial reconciliations, and in two of these cases the women had also wanted a reconciliation before the mediation. Eight of these nine included social service referrals and/or behavior changes.

In 209A cases, more than half of the men claim during their intake interviews that their only goal or major goal is reconciliation. Since so few agreements call for reconciliation, quite clearly something is happening to make the men more realistic. When we discuss this finding with the mediators, their observation is that the sessions often convince the man that the woman is serious and does not want to reconcile at that time. Once the man becomes convinced, and here, social pressure tactfully exerted by the mediators is helpful, the couple can then begin to make decisions about their current situation.

In non-209A cases, where most of the couples have already been living apart, often for long periods, reconciliation is the expressed goal of many fewer men, only about 20%. A wide range of other concerns are stated, from continued separation to an end to perceived harassment to property division and visitation.

Among women in 209A cases, the most frequent goals upon entering mediation are support and continued separation. In non-209A cases, the women's most frequent goal is to put an end to the harassment and violence she has been experiencing, with practical considerations much less important.

Looking at the relationship between intake issues and written agreements, the most striking finding concerns support. While 25 women asked for support, only 8 agreements included support provisions. Some couples did make verbal agreements regarding welfare applications, and many support needs, especially during initial separations, are provided for by the state, given the generally low socioeconomic composition of our client group. Many husbands were not financially able to provide for the two households necessitated by the separation, and women seemed willing to delay support demands, especially when their wish for continued separation was being met.

INTAKE ISSUES AND RESULTING AGREEMENTS

ISSUE	WOMEN	AGREEMENTS	MEN
support	25	8	3
continued separation	19	18	3
visitation	14	19	11
property division	17	14	15
end harassment/violence	23	8	3
reconciliation	3	9	34
counselling	13	36	0
continuation of relationship	7		7
no contact	2		2
behavior changes	0	15(for both)	5 (for wife)
divorce	1	6	0
drop complaint	0	3	4

In one other area, women asked for an item that is not specifically reflected in the written agreements - that of ending the abuse or harassment. This demand may have been met by other items in agreements, such as continued separation, clarifying visitation arrangements and social service referrals. Continuation of relationship is also implied in many other agreement items, and could not be accurately totalled,

Results of Mediation Sessions

Of the 75 domestic violence cases mediated, 67 or 89%, resulted in agreements, comparable to the program's overall resolution rate. In seven cases, second mediation sessions were scheduled, after the first session resulted in a time-limited agreement. In a recent case, for example, a couple who admitted to mutual alcohol abuse and violence over a period of ten years, came to mediation on their 16th wedding anniversary. The wife had sought a restraining order five days earlier when she decided that they must be separated for a period of time to allow them to work with a therapist on their individual and mutual problems. She was not at all interested in ending their marriage, but wanted time to allow change. The husband refused to acknowledge that the separation was necessary and threatened to divorce her if she insisted. Their five hour initial mediation session ended with an agreement that they would remain separate for three weeks and they would jointly continue therapy. At the end of the three weeks they returned to mediation, agreed to continue to live apart and to make future decisions with the help of their threapist. The second agreement could not have been reached at the first session because the husband was unwilling to plan more than three weeks ahead. All second mediation sessions end with agreement. Attendance at a second session appears to be a sign that the parties have felt the process to be useful. In fact, looking at second agreements, they are usually quite similar or identical to the first agreement. Some couples seem to need a second meeting to reaffirm their committment to peaceful decision making.

Agreement Results

Mediation agreements are monitored by telephone after two weeks, two months, and three months. Parties may also contact the program if they feel their agreement is not working. 85% of all the program's mediation agreements are upheld for a period of three months. In domestic violence cases, this rate is considerably lower: 69% of the agreements are upheld. This 69% includes 12 agreements which were only partially upheld, but required no further court action, usually cases in which counselling referrals had been requested but not pursued. Of the agreements that broke down, 16 of 21 broke down prior to the three month follow-up, and five others collapsed after three months.

There is some difference in our success with 209A and non-209A cases in this area. In 209A agreements, 84% are maintained for the initial three months and 81% overall. In the non-209A cases, only 64% of the agreements are maintained for three months, and 40% broke down eventually. An explanation for this difference in success rates may be that the parties in non-209A cases have been separated longer and have a well-established pattern of conflict. As we have seen, it is more difficult to get non-209A disputants to agree to mediation and to attend the sessions. Based on the goals for these sessions reported by women, there are fewer practical decisions that need to be made on issues such as visitation and support, and the basic problem is the harassment and violence which has accompanied the couple's long-standing separation. Mediation may be less able to interrupt this established pattern and restructure the relationship, which it can do more successfully in 209A cases where the parties are newly separated and looking for some way to decide about and to structure their new relationship. In light of this finding, mediation seems particulary useful in the early stages of marital separation, though even in the non-209A cases, 6 out of 10 agreements do hold.

Unfortunately, we do not have follow-up data to show what happens to cases in which mediation agreements break down. Our impression is that most parties seek more formal legal assistance and initiate probate proceedings, or that they decide to live with a situation which is less than they would like, but better than it had been.

Other Case Characteristics

40% of the couple cases referred to mediation involved complaints about alcohol abuse on the part of one or both parties, 10% of the cases involved parties who required treatment for serious psychiatric problems at some time in the past, with 7 husbands, 2 wives and one couple falling into this category. The cases in this category were evenly divided between 209A cases and non-209A cases, 6 were settled (3 209A and 3 non-209A) and 4 were not settled (two in each category).

Conclusion

To summarize, we believe that mediation can be an important complement to the protection that courts offer in domestic violence cases. The experience of our clients has been that when they secure a restraining order they are eager to come to a better understanding of the new relationship that the restraining order produces. Mediation helps clients develop new ground rules. We have found that women are not returning to their husbands as the result of mediation; in fact, husbands who most often desire reconciliation, are able to come to grips with their new situation. On the other hand, in cases where the parties have been separated for some time and a pattern of harassment and violence has developed, the program has been somewhat less successful in helping couples to resolve their dispute, as indicated by a smaller number of cases in which agreements are maintained for three months. This suggests that mediation has its maximum impact at the point at which a relationship needs to be restructured and the conflicting parties are open to reassessing their behavior.

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DOMESTICE VIOLENCE MEDIATION DEMANDS CAREFUL SCREENING

by Larry Ray, Staff Director

American Bar Association

Special Committee on Alternative Means of Dispute Resolution

Each morning, I would read the morning paper apprehensively, hoping I would not encounter any familiar names in the reports of violence that occurred the night before. Television dramas lost their appeal; I began devouring situation comedies. My perspective on holidays changed from viewing them in terms of happy family reunions to viewing them as occasions for intra-family strife. Screening citizens complaints at the Prosecutor's Office transforms one's outlook on life.

The Prosecutor's Office is often referred to as *"the legal emergency room."* Sometimes it seems as if all of humanity is locked into unhappy and violent dilemmas from which they can't extricate themselves. Each day in the prosecutor's office, seventy people signed in to file what they perceived to be a criminal charge. Most had been referred from the police who had been called out on the scene. Rarely do police actually view the alleged crime or violation. Usually they refer them to the prosecutor.

Each person has their story - their perspective to describe. Usually, it went well beyond my imagination, although the longer I took complaints, the more I was able to discern basic themes. But each incident was different, involving different personalities and locations. Out of a muddled array of information, perspectives and speculations, I attempted to aid the complainant to select a course of action whether that be to file an official charge, to schedule a mediation session, to phone the other party immediately, to send a warning letter, to contact a community service agency, or just to talk.

It was not unusual for the person to arrive with a basket-load of complaints ranging from a broken windshield precipitated by a neighborhood fight to someone tampering with the mail to someone receiving a welfare check who didn't qualify. Frequently, both parties to the dispute had made unwise decisions which lead to the incident. Other times, there existed a discernable victim. People demanded that I be just as sensitive to a dog barking complaint, a harassing children complaint as I was to a domestic violence incident. Every city has its story of harassing children which lead to the use of a shotgun.

After several years, a group of us began to realize the problem-solving did not begin at a mediation session or in the courtroom, but often began during the first contact with the complainant. Intake should become much more than a clerical function, but instead an opportunity to interview the party attempting to discern what could be done immediately and what course of action would be most appropriate. Additional law and social work students were hired under the supervision of an attorney and mental health professional forming an identifiable Intake Component of the prosecutor's office. Interviews averaging a half hour provided an effective tool to diagnose the complaint.

As the intake component became increasingly sophisticated, domestic violence complaints were highlighted as an area of deep concern. In 1977, the Committee on Battered Women and the local shelter for battered women were blaming the prosecutor's office for much of the inaction on domestic violence complaints. They construed the mediation program as reconciliation. On the other hand, the prosecutors were perplexed as to what to do with domestic complaints, and usually did little, always citing the frustrating, but alarming percentages of dismissals.

Gradually, the intake counselors instead of ignoring the committee and the shelter, began attending the meetings and visiting the shelter. Shelter and committee advocates began observing intake and mediation sessions. A realization began to emerge that all of them were involved with a common problem-domestic violence. The shelter advocates learned that mediation was not synonymous with reconciliation. Frequently, mediation resulted in relatively peaceful partings of the disputants. Prosecutors and intake counselors learned of the cycle of domestic violence. Both groups began to realize that they were dealing with a broad range of domestic violence from the first time a verbal assault had occurred to severe beatings. Each necessitated different responses; and so collaboration began.

Mediation demands of the parties, a high level of participation. Mediation appears to be most effective when the parties are basically reasonable and there exists a basic balance of power. Mediation may be most useful when only minimal violence has occurred, when it is "*the first time*," and the parties desire to remain together. Much of this information can be obtained during an initial intake with the parties. Open-ended and focused questions can aid the complainant to release a flow of information on the specific incident. Questions should be directed to discern problem priority - of the problems indicated which are the most important; problem chronicity - how long has the situation existed; and stability of the relationship.

Answers to all of these questions will aid in indicating what course of action should be taken. The advantages to mediation is that it's fast, convenient, simple, and flexible. The parties remain in control. Often, a domestic violence mediation may be scheduled the same day the complainant has registered the complaint. If several hours or sessions are needed, then that is usually done. Mediation programs should cultivate solid relationships with local social service agencies and the shelters. If a balance of power problem exists, mediation programs usually permit shelter advocates or relatives to oberserve the session as long as the parties themselves do the talking.

The most important aspect of mediation is that the parties are in control. What is best for the prosecutor's office, the shelter, or any other entity is superceded by what is desired by the parties. Mediation programs across the country are finding that if the parties show for the session, ninety per cent of the time they reach an agreement. Follow-up contacts (which could occur the next evening, the next week or month) are showing that eighty to eighty-five per cent of the parties contacted are satisfied with the results and most of the agreement components were upheld.

The promulgation of mediation programs throughout the country is part of an emerging "*alternative dispute resolution movement.*"

ALTERNATIVE DISPUTE RESOLUTION MOVEMENT

The search for alternative methods of resolving disputes has burgeoned to "*a movement.*" It is difficult to determine exactly when a collection of casual inquiries becomes a movement, but dispute mediation has grown from three centers in 1971 to more than 180 in 1982. This growth indicates a significant dissatisfaction with the legal system's adversarial approach to resolving disputes. Just as important, the growth shows that citizens believe there must be a simpler, more common-sense, less expensive, less time-consuminng way to resolve the thousands of disputes and quarrels between neighbors, friends, landlords/tenants, and family members.

This is not to say that courts and attorneys no longer have a role in resolving disputes. On the contrary, the alternative dispute resolution movement is permitting attorneys to define their roles better. American Bar Association President David R. Brink envisions a day when attorneys will be viewed as "*counselors, problem solvers, and deliverers of prompt, appropriate, and affordable justice.*" At the same time, the legal system must recognize its responsibility in causing the alternative resolution movement. Many leaders in the alternative dispute resolution movement seize on the idea that many of the traditional institutions such as the extended family, neighborhoods, churches, and communities have broken down -- are no longer as important as they once were. These insittutions used play a major role in resolving interpersonal quarrels and fights. A grandmother may have intervened in a dispute involving siblings; a priest may have aided communication between parish members. Some of these same movement leaders herald society's return to these "*simpler, less complicated times.*"

But alternative dispute resolution can have a greater impact on society than looking back. In fact, the ultimate goal of most individual mediation sessions is to look forward to what will happen if the two parties encounter a similar problem in the future. Ideally, during these sessions parties not only address the present problem of, for instance, a broken windshield, but also confront the underlying issue -- possibly the parties' relationship. This sets the stage for the parties to resolve future dispute through a reasonable dispute resolution process of effective communication. This could mean that the alternative dispute resolution movement could aid society to focus on resolving rather than perpetuating disputes. It is, of course, common sense to extend this new perception of dispute resolution well beyond individual quarrels to society's disputes. But the success of the alternative dispute resolution will largely depend upon an informed public and the professionals who operate the dispute resolution centers. Community awareness and support is a prerequisite to the integration of dispute centers into the national system of justice.

STATE of the ART - DISPUTE MEDIATION PROGRAMS

To date, the most significant aspect of the alternative dispute resolution movement has been the burgeoning growth of the dispute mediation programs (also known as citizens' dispute centers, community boards, neighborhood justice centers, night prosecutor's mediation programs). These programs do not rely heavily on the formalities of the legal system. Instead, mediation is stressed rather than the adversarial model. Mediation is a process in which a neutral third party assists two or more parties in resolving their disputes. A mediator facilitates communication between the parties, rather than making their decisions. Complaints involving persons with ocntinuing relationships such as family members, neighbors, and friends dominate the case types.

In a mediation setting there may be little need for lawyers, a condition which reduces the disputant's costs and makes the proceedings less adversarial. Generally, lawyers are happy not to be part of cases which carry heavy emotional frieght and little or no fee. In fact, one important finding concerning minor dispute mediation is that most of their economic claims are too small to be handled by lawyers.

One problem with the limitations in jurisdiction of most of our courts is that judge often cannot deal with the variety of problems presented in a single situation. The social problems confronting disputants often have both civil and criminal aspects. A justice mediation program may be better able to consider the whole problem than a court.

The progams stress mediation, conciliation, or fact finding and not adversary process. Their purpose is to arrive at a mutually acceptable solution. The people involved may have to deal with each other in the future, and an amicable solution of their problems will facilitate future cooperation. The proceedings are private and at more convenient times than courts usually meet. The mediators often can give more time to a dispute than a hard-pressed judge. The environment may be more informal and less intimidating.

The ABA Special Committee on Alternative Means of Dispute Resolution in 1981 identified 180 dispute resolution programs. Their diversity is seen in the differing sponsorship, approaches or strategies taken, types of cases and the dispute resolvers themselves.

Sponsors of the programs include courts, mayors' offices, bar associations, prosecutors' offices, private foundations, private citizens, and consumer groups. The approaches vary from referral by a social service agency or the court itself to self-referral or walk-ins. The types of cases heard cover a wide variety of both criminal and civil matters. Mediation hearings may occur in a church, community center, or a laundryroom, as well as in city council chambers or the prosecutor's office.

Highlights of the ABA Special Committee's survey of 180 programs summarize this diversity.

- Population: 34 percent of the programs are located in cities of less than 100,000; 34 percent, in cities between 100,000 and 500,000; and 32 percent, in cities of more than 500,000.
- Duration: 36 percent of the programs have been in existence for less than two years; 51 percent , between two and six years; and 12 percent more than six years.
- Annual Budget: 29 percent of the programs are funded by either the courts or the district attorney; 36 percent, by local government; 28 percent, by federal government; 24 percent, by private sources; and 6 percent, by fees.
- Caseload: 51 percent of the programs handle fewer than 500 cases annually; 35 percent, attorneys; 12 percent, academicians or students; 33 percent, social service professionals; and 7 percent, court clerks.
- Referral Sources: 23 percent of the programs rely on the courts, judges and clerks for the majority of their case referrals; 23 percent, the district attorney, prosecutor and state attorney; 19 percent, police and law enforcement; 12 percent, community agencies; 18 percent walk-ins and self-referrals; and 6 percent, government and bar associations and private attorneys.

Underlying this diversity, all dispute mediation programs appear to have one central goal: to help citizens resolve their disputes effectively, expeditiously, and with compassion. For a more detailed analysis, the mediation centers may be divided into two categories: those annexed to the legal system and those more closely tied to the community.

LEGAL SYSTEM - DISPUTE PROGRAMS

Judges, city government leaders, and district and private attorneys have long realized the value of mediation in resolving interpersonal problems, as, for example, when disputing parties are called into private offices in a last-ditch effort to avoid court proceedings. But the diversion movement's quest for relieving court dockets led to creation of the first prosecutor-sponsored mediation program in Columbus, Ohio, late in 1971.

The Columbus Night Prosecutor's Mediation Program has served as the model for more than 30 other similar programs throughout the nation, including those in Memphis, South Bend, Miami, Los Angeles, and Lexington, Kentucky. It began as a volunteer program using law professors. After two years of Law Enforcement Assistance Administration funding, the program won Exemplary Award status from LEAA. Currently, the program is funded totally out of the prosecutor's budget and handles one-third (18,000) of all criminal complaints brought by citizens to the local legal system.

The Columbus Program contains two components: interpersonal mediation hearings, which comprise 50 percent of the caseload, and administrative hearings, which include bad check cases, health code violations, motor vehicle regulations and utility cases.

Currently, using more than 60 law, social work, and psychology students as mediators and counselors, the Columbus program conducts informal hearings during evenings and weekends. Many of these complaints are against family members, neighbors, and (former) friends. Approximately 50 percent of the complaints are scheduled for a voluntary informal mediation session one week later. On the hearing date, both a mediator and a counselor are assigned to the parties. The hearings average 40 minutes.

Building on this model, both Florida and Kentucky have created statewide mediation programs sponsored by the court. Presently, the state of Florida has more than 17 court-annexed mediation programs focusing on both adult and juvenile problems. Through Kentucky's state Pretrial Release Commission, four programs, using lay citizens as mediators, aid in relieving the local court dockets.

Recently, both the Houston and Boston bar associations have sponsored mediation programs using volunteer attorneys as mediators. The Houston Neighborhood Justice Center is located in a renovated warehouse in a neighborhood from which they expect most of their referrals. The Boston program is located in a downtown office building.

Program staff are convinced that the quality and the duration of the agreements reached are better and longer lasting than those which may have been obtained through the system. Time is saved for both the participants as well as the legal system, since most mediation centers schedule hearings within a week.

EVALUATION RESULTS

Assessing the impact of the justice centers on both the parties' dispute and the legal system has been the subject of seven evaluations of thirteen programs. The evaluations vary substantially in their methodology, but the following statements may be made based on evaluation findings:

- The rate of both parties appearing for mediation in court/prosecutor-related programs is 60-70 percent;
- Once the disputants arrive at the justice centers, the chance of the hearing resulting in an agreement is extremely high (70-90 percent);
- Most of the agreements reached during the hearings contain behavioral provisions, e.g., to stay away from each other or to end the relationship;
- Generally the disputants view the mediation process as fair and effective;
- The majority of disputants believe that they had a fair opportunity to tell their side of the story; and
- Most cases are totally processed within one month, including follow-up which compares favorably with court-processing time.

The future of mediation dispute centers is bright. Chief Justice Warren E. Burger urges the increased use of such programs; American Bar Association President David R. Brink has selected alternative dispute resolution as one of top priorities. Despite the decrease in availability of federal funds, ongoing centers and planning groups are locating local and state funding sources.

LEGISLATION

State dispute resolution legisaltion may assist in resolving several areas of concern: funding, legal issues, and legitimacy of the mediation process. Eighteen states have either passed or planning to introduce dispute resolution bills. Recent New York legislation (S6369-B; Chapter 847 of the laws of 1981) provides funding for new and ongoing centers as well as establishing confidentiality within the mediation session. Both Oklahoma and Texas legislatures considered bills to increase civil court filing fees. This increase would be specifically earmarked for continuation funding for mediation centers. North Carolina and Minnesota have passed legislation establishing a state entity to encourage mediation throughout the state. Additional bills are being considered to meet the legal issues of liability of mediators and agreement enforceability concerns.

CONCLUSION

Although the support of the Chief Justice, the ABA, and the state legislatures will prove to be of great assistance, at the heart of the alternative dispute resolution movement is the enthusiasm and support of citizens who use the mediation services. There exists a contagious excitement about the mediation process. The reason may be its common-sense approach to problem-solving. The citizens with the problem share in the responsibility of resolution.

In order for mediation centers to be successful, citizens must use them. Citizens will use mediation when first, they are aware of its availability and second, they believe the process is credible. Throughout the country, mediation centers are learning that they must have, at least the tacit support, of both the local social service and legal system. So far, both systems have proven to be the major referral sources to the mediation centers. As citizens become increasingly aware of mediation, it is hoped that they will consider mediation as the first step in resolving their disputes.

The focus on increased screening of complaints has intensified. It is realized that not all complaints, especially in the domestic violence field, are appropriate for mediation. The American Bar Association's Special Committee on Alternative Means of Dispute Resolution is planning to establish two pilot projects: *multi-door dispute resolution centers*. This concept envisions a central center in which citizens can register almost any type of complaint. The center staff be well trained in communication and crisis intervention skills. They will be able to assist the parties in diagnosing the complaint and referring it to the most appropriate door (dispute resolution process) ranging from conciliation, mediation, arbitration, factfinding to adjudication. It is hoped that these centers will aid in the search for the best dispute resolution approach to citizens problems.

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STOPPING DOMESTIC VIOLENCE: A GUIDE FOR MEDIATORS

BY

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A recent report on domestic violence by the Civil Rights Commission examined all of the services currently available to victims of domestic abuse and their mates and assessed the usefulness of each of these options. As to mediation, the report concluded that "Mediation and arbitration should never be used as an alternative to prosecution in cases involving physical violence."[1] In explaining the reason for this recommendation, the report stated that:

> Mediation and arbitration place the parties on equal footing and ask them to negotiate an agreement for future behavior. Beyond failing to punish assailants for their crimes, this process implies that victims share responsibility for the illegal conduct and requires them to modify their own behavior in exchange for the assailants promises not to commit further crimes.[2]

While mediation of domestic violence cases is on the upsurge, many advocates for battered women are opposed to using mediation in cases involving wife abuse[3] for the same reasons discussed by the Civil Rights Commission. Many mediators, on the other hand, tend to have great confidence about the usefulness of mediation to resolve most interpersonal disputes. These two positions have become so polarized that most attempts at dialogue about the problems with mediation quickly degenerate into battles about whether or not abuse cases should be mediated at all.

A more challenging question than whether to mediate domestic violence cases is how to mediate them. This paper will look at the implications of the feminist analysis[4/] for mediators, and suggest ways of adapting mediation to make it an effective tool to stop wife abuse. The premise of this approach is that a good mediator can do more for battered women than a bad prosecutor. Many court systems screen out so many domestic violence cases and do so little for the ones that manage to get into court, that to rely on formal legal remedies or law enforcement to protect battered women is to leave them without any remedy at all. If a woman has to wait two months for a court hearing, it is quite likely that she will not appear for the hearing, because the system failed to provide assistance during a crisis. If she can talk to a mediator within a week, it is quite likely that she will appear.

There is no one correct remedy for battering. Experience has demonstrated that to stop the violence some women need only a civil injunction, while others need to move across the country and change their identity. It has also become clear that any service-provider who treats battering as a serious problem, who asks about it and attempts to help, who takes the position that everyone has a right not to be beaten, provides a critically important service.

The problems presented by battering relationships pose a challenge for mediators. Often the violence has gone on for years; it is not an easy problem to resolve. Often the batterer will totally deny his violence, or admit only to an occasional slap. Every domestic violence case is a burdensome responsibility, because a failure to respond effectively could result in death or serious injury.

Because of the complexity and seriousness of domestic violence, those who provide mediation or any other service to people in abusive relationships need training on domestic violence, and need to structure their services to take account of the likely recurrence of violence and the importance of protecting the victim. Below are suggested guidelines which may lead to more successful mediation of domestic violence cases.

1. Mediation of any case in which one person has been physically abused should focus primarily on preventing subsequent abuse.

Frequently the primary goal of mediation is to encourage the parties to work out their difficulties and to reach an agreement. Where the parties are married or living together, often the goal is some form of reconcilliation which enable them to continue their relationship. In many abuse cases, the parties present a variety of issues, including property disputes, disagreements about the operation of their household or the care of their children. If these issues are given equal priority with that of stopping the violence, an agreement is frequently reached which either fails to address the violence altogether, or which treats the violence as one of many burdens of a multi-problem family.

In any relationship in which there has been serious or repeated violence, an agreement which fails to deal seriously with the issue of violence is very likely to break down. Likewise if the violence is not directly addressed, the agreement amounts to a tacit acceptance of abuse, and often reinforces the tendency of abusers and of battered women to blame the victim for the beatings.

Violence against women by their husbands and lovers has been tacitly accepted by doctors, lawyers, judges, and others for centuries. The first step in stopping the violence is to make clear to the abuser that such conduct will not be tolerated, and to the victim that she has a right not to be beaten. Mediation of domestic violence cases cannot be effective unless the delivery of this message is a primary goal.

2. Mediation of domestic violence cases should be structured to equalize the balance of power between the parties.

The structure of mediation assumes that the parties have sufficiently equal power that each may air his or her grievances, ask for what he or she wants, and agree to an outcome or decline to agree if unsatisfied.

In contrast to this model, coercion and intimidation of the victim are primary dynamics in abusive relationships. It is well-documented that thousands of battered women tolerate beatings for years because they are threatened with worse beatings if they talk about their problems or seek help.[5] Those who do seek help from the courts, most often withdraw from action they initiate because of intimidation.[6]

In dealing with an abusive person and his victim in a mediation setting, these dynamics may not be apparent. If the mediators meet with the couple together, the violence may never be mentioned. If the victim raises the issue, the batterer may deny it as a serious problem more persuasively than the victim describes it. Batterers tend to deny their violence even to themselves, and go to great lengths to conceal the violence from others if confronted. In short, a battering relationship is often so dominated by the abuser that open communication with the couple is not an option.

Taking account of the power imbalance and correcting for it is a key to effective mediation. Possible techniques for changing the balance of power during mediation are:

A. Require each party to go through several weeks of separate counseling before attempting mediation.[7] Separate counseling is more effective than couple counseling in getting the batterer to acknowledge his violent behavior, and in helping the victim to recognize and assert her own needs. If the batterer has acknowledged his difficulties in controlling his own violence before he comes to mediation, mediation may be quite meaningful. If the victim comes to mediation able to talk about the violence and to demand that it stop, she is more likely to leave mediation feeling satisfied that at least she asked for what she wanted.

B. Begin mediation by meeting separately with the parties. Initial separate meetings are a good way to equalize the power balance. It gives the victim an opportunity to discuss the battering and other problems openly and reduces the danger that her mate will later punish her for saying too much. The batterer may dislike this arrangement because it prevents him from supervising the session. The mediators should be aware that if the contents of the separate meeting are openly discussed with the abuser, he may retaliate later.

The individual meeting with the abuser should focus on confronting him with his responsibility for the violence. At any mention of his violence an abuser may explain what the victim did to provoke him, or deny the allegations altogether. During the individual meeting, the mediator has an opportunity to make clear that he or she cannot be persuaded that the abuse is caused by the victim.

C. Use advocates to represent each party rather than requiring each to speak for him or herself. In labor negotiations the parties do not generally represent themselves but use trained advocates to discuss their disputes. Battered women are often poorly equipped to assert their own needs, especially in the presence of the abuser. Giving a speaking role to someone who is less fearful of the abuser may result in a clearer articulation of the victim's needs. Likewise an advocate for the abuser may help to create an atmosphere of genuine communication rather than trying to control the disclosure of embarassing information.

Mediators may feel that using advocates is too great a sacrifice of direct communication. If so, one alternative is to allow the parties to consult with an advocate during the sessions but ask them to speak for themselves. Those who work with battered women have discovered that if the victim has someone with her for moral support during any proceeding, she gains courage to confront the situation and ask for what she wants. The presence of others may interfere somewhat with the process of mediation, but without such assistance, the resulting agreement may not reflect her concerns.

3. Screen all cases involving couples for a history of abuse. Where abuse has occurred, address it during mediation even if it was not the presenting issue.

During intake all prospective participants who have an ongoing intimate relationship should be asked about abuse. Where there has been any abuse, the victim should be asked for details. Where any significant violence has occurred, the abuse should be directly addressed during mediation whether or not it was a presenting issue. This recommendation is at odds with the general premise that mediation is voluntary and will seek to address whatever the parties wish. However, if the mediator does not ask about violence, or does not follow up on it when it is mentioned, this will likely be read by the parties as tacit condonation of the situation.

The need to ask arises because victims of abuse are frequently so fearful that they seek help without stating that they are being beaten. This is not to suggest that violence should necessarily be the focus of the mediation, but only to point out that awareness that one party to mediation has been assulted by the other may be a key to understanding the dispute.

4. Structure mediation of domestic violence cases to maximize opportunities for enforcement.

Men who batter tend to be externally motivated, and to rely on others to set limits on their own behavior.[8] This means that any form of intervention in an abusive relationship is more likely to stop the violence if there is some enforcement power, if some negative consequences will flow from noncompliance with the agreement.

Traditional mediation is often not designed to produce a legally enforceable agreement. Failure to provide some enforcement mechanism when the subject of mediation is physical violence can be quite dangerous. An abuser who is angry after a mediation session because his victim gave too many details about the injuries she suffered can retaliate in private without fear of sanction. Because the subject of mediation is serious criminal conduct against another person, the abuser should not be left with the impression that the agreement is only as good as his word.

To provide more leverage over domestic violence through mediation:

A. Conduct mediation as part of a deferred prosecution program. Mediation can be conducted after filing of a criminal charge against the abuser, and prosecution of the charge deferred pending compliance with a mediation agreement. If the abuser violates an agreement that the violence will stop, the charge can be prosecuted. The prospect of prosecution will give the agreement needed teeth, and make it a more effective deterrent. If the abuser complies with the agreement for a specified period of time (a year, perhaps) the charges can be dismissed and his record expunged. This provides an incentive, particularly to someone who has no criminal record.

B. Conduct periodic follow-up interviews to identify agreements that have been violated; report violators to the prosecutor's office.

When mediation results in an agreement that abuse will cease, the victim should be encouraged to report any subsequent violence. Follow-up interviews should be conducted periodically to determine whether violence has recurred. Both parties should be informed that the mediator will recontact them. The interviewer should make sure to talk with the victim when the abuser is not present.

Even if there is no formal mechanism for enforcement of a mediation agreement, tracking compliance may greatly reduce the likelihood of violation. Some batterers may be deterred by participation in mediation. Where the agreement is ineffective, however, more formal action should be taken to stop the abuse.

C. Encourage the victim to seek more formal remedies concurrent with mediation. Mediation should be offered as a tool to help parties communicate. Participation in mediation should not preclude other relief. It may be productive for a victim to obtain a civil protection order or to file a criminal complaint to obtain legal protection from abuse, and then to use mediation as a forum in which to work out a visitation agreement, a property dispute, or other less volatile issues. In such cases the mediator should be supportive of other action taken by the victim, and should not treat it as conflicting with the goals of mediation. Mediation may be a good opportunity for the parties to discuss their feelings about other pending legal action. However, a mediation agreement should never include an agreement to request dismissal of criminal charges, or not to pursue other remedies. Even to seriously discuss such issues is to reinforce the dominance of the abuser, and to further reduce the power of the victim.

5. The mediation agreement should focus on the safety of the victim.

The terms of a mediation agreement in any case involving domestic violence should be designed to protect the victim. Often the victim may be unaware of all the available options to increase her safety; the mediator may assist by suggesting appropriate options.

A. Do not condition the abuser's agreement to stop the violence on the victim's agreement to do or not do anything. If he says he will not beat her if she has dinner ready on time, then if she is late in preparing dinner, the agreement has essentially authorized a beating. The agreement should make clear that the victim has a right not to be beaten regardless of what she does, and that the abuser has a responsibility to control his violent behavior.

B. If there are weapons in a residence shared by the parties, the agreement might provide that they be removed from the household. Forty percent of female victims of homicide in the United States are killed by husbands, lovers, or other family members.[9] To suggest removal of weapons may seem like an invasion of privacy; where any serious abuse has occurred, however, prevention of a homicide should assume greater priority than the protection of privacy.

C. Where violence is frequent or serious, the parties might agree to separate or to avoid any contact with each other. In some abuse cases, the victim will not seek assistance until she has given up hope of salvaging the relationship. The mediator should be attuned to the direction the victim wishes to go. If the victim wants a separation, the mediator should not attempt to reconcile the parties. Instead the mediator should let the parties dictate whether the purpose of mediation is to bring them closer or move them apart.

In most abusive relationships, any attempt by the victim to leave the relationship is met by intense resistance from the abuser. Often the violence will escalate at this point. If the victim expresses a desire to separate, the need for protection is even greater.

D. The agreement might include a provision that the batterer will participate in counseling. If the parties intend to stay together, the abuser may get assistance in learning not to be violent through therapy. Many communities have now developed special programs for abusers--these should be identified. Treatment for alcohol or drug abuse may also be critical to stopping the violence.

E. An agreement on visitation rights with children might include third-party supervision. If the parties are separated and have children, visitation may provide the abuser with continuing opportunities for abuse and intimidation. The mediator might explore, if the victim wishes to minimize contact with the abuser, whether visitation can be arranged at the house of a friend or relative, and structured so that the parties are not present at the same time.

6. Avoid sweeping problems under the rug in order to reach an agreement.

Mediators often measure their success by whether an agreement is reached in a particular case. In their zeal to find some ground for agreement, serious difficulties are often sidestepped or minimized. This is risky in domestic abuse cases because failure to address the violence means that recurrence is likely.[10/] To reduce the tendency to avoid unsolvable problems:

A. Keep an open option that no agreement will be reached. In some abuse cases the most productive outcome is a recognition by the parties that they cannot agree about why the battering occurs or what will stop it. Under such circumstances, for them to reach an agreement may create false expectations that their problems have been solved, and may set the victim up for another beating by encouraging her to go back and try again. If the mediators recognize the profound difficulty of reaching a realistic agreement to stop the the violence, they will in some cases produce meaningful agreements. In other cases the mediation process will educate the parties about the nature and seriousness of their problems.

B. At the end of mediation, identify those terms in the agreement which are most likely to break down and discuss what the parties will do if the agreement does break down.

If the parties leave mediation recognizing that the agreement is only the beginning of a process of problem-solving, they are more likely to continue that process. To avoid creating the illusion of a panacea, the mediator should initiate a realistic discussion of which terms in the agreement are solid and which are more tentative. It is critical that the victim be given information, in private, about what resources exist in the community to help stop the violence. The mediator can help her to plan what she will do if she is beaten again.

7. Train mediators about the nature and dynamics of domestic violence. Any mediation program which expects to encounter battering relationships in the course of mediation should build into its training program substantive material about domestic violence. This

training should go through basic issues such as why women are abused and why they stay in abusive relationships, characteristic behaviors of batterers and victims of abuse, practical techniques for protection of battered women, legal remedies for abuse, and identification of groups in the community which work with people in abusive relationships.

If staff members lack expertise in these issues, shelter workers or other advocates for battered women might be invited to conduct this part of the training.

Conclusion

Mediation of domestic violence cases can be an important mechanism to prevent subsequent abuse. Some of the problems presented by abusive relationships are not likely to be successfully addressed using conventional mediation techniques. If the parties are treated as having equal power, if they are only allowed to speak in the presence of the other, and if the goal is reconcilliation, mediation may be of little assistance. Mediation can, however be structured to equalize the power of the abuser and the victim, and stopping the violence can be set as a primary objective. Mediators who study the problem of domestic abuse and adjust their techniques to respond to it can make a major contribution to the protection of battered women.

FOOTNOTES

1/ UNITED STATES COMMISSION ON CIVIL RIGHTS, UNDER THE RULE OF THUMB: BATTERED WOMEN AND THE ADMINISTRATION OF JUSTICE 96 (1982).

2/ *Id.*

3/ "Wife abuse" and "domestic violence" are used to refer to violence between adults who are intimates, regardless of their martial status or living arrangements. The terms were chosen based on their common usage rather than their descriptive accuracy.

Victims of abuse are referred to as female and batterers as male because it is widely recognized that, although some men are beaten by their mates, the vast majority of adult victims are female.

4/ This paper is characterized as a feminist analysis because it is premised on the theory that battering is a means by which men control and dominate women. Many batterers respond to questions about why they are violent toward their mates by explaining that women need to be "kept in line" or by saying that the women are nagging, demanding or are not good homemakers. The abuse is a means by which many men make women obedient and submissive. *See* R. DOBASH AND R. DOBASH, VIOLENCE AGAINST WIVES: A CASE AGAINST THE PATRIARCHY (Free Press 1979).

Developing remedies for abuse with this perspective in mind, it becomes critically important to look at the impact of the remedy on the power relationship between the parties, and to structure any remedy to equalize the balance of power.

5/ *See* D. MARTIN, BATTERED WIVES (Glide Publications 1976).

6/ L. LERMAN, PROSECUTION OF SPOUSE ABUSE: INNOVATIONS IN

CRIMINAL JUSTICE RESPONSE (Center for Women Policy Studies 1981).

7/ The mediation component of the Cleveland Family Violence Program found that separate counseling prior to mediation greatly improved the quality of mediation.

8/ *See* A. GANLEY, COURT-MANDATED COUNSELING FOR MEN WHO BATTER: A THREE-DAY WORKSHOP FOR MENTAL HEALTH PROFESSIONALS (Participant's Manual) (Center for Women Policy Studies 1981).

9/ FEDERAL BUREAU OF INVESGIATION, CRIME IN THE UNITED STATES 1979, 10-11 (1980).

10/ It should be emphasized that addressing the violence means incorporating into the agreement an unconditional commitment by the abuser that the violence will stop. This is only possible where the abuser acknowledges the occurrence of violence and acknowledges his responsibility for it. The option of reaching no agreement should be exercised when such a commitment is not possible and when stopping the violence is one of the victim's primary objectives.

Social and Legal Policy Implications of Domestic Violence

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What is domestic violence? If you ask five different people you can more than likely be sure you will get five different definitions. Someone may tell you domestic violence is "those stupid husband and wife calls I get that should be settled in the home." Another person might sav it is a spouse's right to punish the other when they get out of line, and a victim might define domestic violence as "the slaps, punches and bruises I live with. It's my hair being pulled, my stomach being kicked and having my face wiped in my own blood for having dinner ten minutes late, looking at him the wrong way, or because my husband had a bad day at work." For well over one million [1] victims, domestic violence is the day to day fear people live with. There is no single widely accepted definition of domestic violence. Each state, city and country defines its severity, assailants, and victims differently. For the purpose of this paper, domestic violence will mean: any intentional attempt to harm or harm done by a person in or having been in an interpersonal relationship of marriage or permanence. Although the definitions may differ, a few startling facts remain. In a study done by McEvoy in 1970 he found that one out of every five men interviewed, approved of slapping their wife(ves) in the face. [2] Domestic violence is the number one cause of police death in the United States, and 65% of all homicides are between family members. [3] In Atlanta, Georgia, 60% of all police calls on the night shift are domestic disputes and throughout the country anywhere between 70 - 95% of all complaints filed are filed by female victims. [4] As surprising as these figures may be, researchers in the area agree, however that domestic violence is one of the most underreported crimes in the country. [5]

With these figures so outstanding, it is a wonder why the movement against this form of inhumane behavior did not begin until 1971 in England. [6] The efforts made to bring attention to this problem have been long and hard. Domestic violence is a complex problem because it involves so many aspects of life. Some experts in behavioral science say it is a form of mental illness learned from birth or born in an individual. Sociologists say it is a product of one's environment, culture, society, and economy and others say it is an unacceptable release of stress. Whatever the reason, domestic violence involves the individual and society. It involves not only behavior, but attitudes and not just one's society, but the way a society is responding to the problem.

This paper will outline the history of domestic violence in the United States and abroad. It will also show the progression of policies that deal with this problem. Policy makers have divided themselves in a way. When addressing the problem of spouse abuse, for the purposes of this paper, spouse abuse will be used synonymously with the term domestic violence. Legal experts write the laws and legal decisions, and although testimony is heard from those in the area of social service, their concentration is on the legal reamifications of the issue. Social workers do the same thing, and thus policy makers working on the same issue travel in two parallel lines. This paper will examine social and legal issues of domestic violence and attempt to give some insight on how these professions can work more productively together in their efforts to make more options available for victims of spouse abuse.

The history of domestic violence is not as recent as legislative efforts to abort the problem. Domestic violence can be traced to Adam and Eve. Some historians believe the fact that Eve came from Adam's rib was the start of male dominance in history. The Bible makes mention of the use of domestic violence in the book of Deuteronomy (25:11:12) when it speaks of the mutilation of a wife in her attempts to help her husband fight another man and accidently touches the opponent's genitals: "When men strive together one with another, and the wife of the one draweth near for to deliver her husband out of the hand of him that smiteth him, and putteth forth her hand, and taketh him by the secrets, then thou shalt cut off her hand. Thine eyes shall not pity her." [7] Foot binding was the method used by the Chinese to cripple women for over 1,000 years. [8] In mediaeval times, women were burned alive for anything from threatening their husbands, stealing, refusing a priest, bearing a child out of wedlock, nagging or having a miscarriage. In a mediaeval theological manual, a man is given permission to "castigate his wife and beat her for correction." [9] The Judeo-Christian doctrine espoused the inferiority of women and literally gave its stamp of approval to domestic violence. [10]

Between 1450 and 1481, Friar Cherubino of Siena, compiled a book called The Rules of Marriage which said, "When you see your wife commit an offense, don't rush at her with insults and violent blows...scold her sharply, bully, and terrify her... and if this still doesn't work...take up a stick and beat her soundly, for it is better to punish the body and correct the soul than to damage the soul and spare the body..." [11]

In Russia during the 16th century, Ivan the Terrible and the church sanctified the oppression of women by issuing the Household Ordinance that spelled out the how's and when's a man could most effectively beat his wife. [12] A half a century later in the early 1700's, many Russian women went on a rampage. They murdered their husbands in revenge for "all the injustices they had been forced to endure." Although there was no law against wife killing, there was a law against husband killing. The punishment was being buried alive, standing upright with only the womens' heads left above the earth with a guard to stand over and watch until they died. As one observer wrote, "This was a common sight in the town hall." [13] Late in the 17th century under the reign of Peter the Great, some reform

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was installed. Women were allowed to go out in public, arranged marriages were only done after both parties' consent, and when married, the wife was allowed to have her own property.[14]

In Europe in the Middle Ages, men beat their wives as often as they beat their servants and priests often advised women to take the abuse and obey their husbands. It was during the Middle Ages that women began to be looked upon as a species. During times of famine, women were often the last to eat, and suffered malnutrition. [15]

The Napoleonic Civil Code was another example of the history of spouse abuse. The Code stated the demise of women by ruling that women must be legal minors their entire lives. [16]

England, in the late 17th century became very specific with how a woman should be beaten. The Commentaries on the Laws of England, written by William Blackstone, stipulated the "rule of thumb". For, as (the husband) is to answer for her misbehavior, the law thought it reasonable to entrust him with this power of chastisement, in the same moderation that a man is allowed to correct his apprentices or children..." [17] American colonies were greatly influenced by this and adapted it into their philosophy.

In 1824 the British influence took hold with different states enacting legislation that subscribed to Blackstone's law. In Mississippi, the Supreme Court stated their approval of the husband's role as disciplinarian in the case of Bradley vs. State. It said the husband had the right of "moderate chastisement in cases of great emergency..." It also said that the law had no right to disturb that role.[18]

Towards the middle of the 19th century, some reform was initiated in the United States. In 1871, an Alabama court rescinded the legal right of a man to beat his wife, holding that the two "stand upon the same footing before the law." In 1874 in North Carolina, the court also disapproved of the finger switch rule and said a man was not allowed to beat his wife but qualified it by stating if no permanent injury has been inflicted, it is better to forgive and forget.[19] This is an example of throughout history, social and legal policies have been biased by the thought that a cure for an array of problems was the family.

In the late 1800's, some states tried to make wife beating illegal by passing laws against it. In Pennsylvania in 1886 a bill was proposed that would have made wife beating a crime carrying a punishment of 30 lashes. This bill did not pass in Pennsylvania but one similar to this passed in Maryland in 1882. This was the first law in the United States against spouse abuse.

Although legislative efforts to stop domestic violence began in the 1800's, some countries continue to practice it as a form of punishment today. Purdah, the practice of secluding women from contact with men outside the immediate family is still a common practice among the Muslim population in the Middle East, North Africa, and Asia. Clitoridectomy, an excision of the clitoris, is also practiced today on millions of pre-puberty women in Egype, Sudan, Somalia, Kenya, Yemen, Saudi Arabia, Iraq, Guinea, and Ethiopia. [20]

It is interesting to note that although European and American countries have recently adopted policies that give women more freedom and take the concept of spouse ownership away from the husband, some of the more primitive societies have given women equity throughout history. Women held great power among clans and primitive tribes in the early periods of civilization. [21]

American and British policies on domestic violence followed similar paths and often adapted things from one another. In 1880 a law was passed in England that allowed a wife who had been habitually beaten by her husband to the point of "endangering her life" to separate from him, but not divorce him. Five years later in England, another law was made that made it illegal for a man to sell his wife or daughter for prostitution if they were under 16 years old. Finally in 1891 it was declared illegal for a husband to keep his wife under lock and key. [22]

France passed their law against spouse abuse in 1924. Italy's legislative body declared in early 1960 that the killing of a wife, sister or mother by a man "upholding his male honor" was a serious offense.

Legislative efforts to stop domestic violence were quiet until the early 1970's. It then became illegal in Scotland, Iran, and several other countries. In 1971 wife beating became a social issue, largely due to the efforts of a British woman named Erin Pizzey. She established an advice center in London as a support system for battered women. It eventually became the first shelter for battered women and was called the Chiswick Women's Aid Center or the Battered Wives Center. In 1974 Ms. Pizzey published a book called Scream Quietly or the Neighbors Will Hear. This was the first book on the subject of battered women. While writing the book, she was arrested for "harboring" 110 women and children in a house not legally suited for that many people. [23] Eventually health codes were approved, and the shelter was expanded. Also in 1974 in England, the House of Commons appointed a Special Committee on Violence in Marriage. This is when the international movement against domestic violence began to take hold. [24]

Brazil announced its new penal code in 1975. This prohibited husbands from selling, renting or gambling their wives away. South Africans are still allowed to beat their wives but occasionally women get custody of the children. [25]

In the United States, the movement began to take force in 1973. Pennsylvania's National Organization for Women formed a State Task Force on Household Violence was formed by Nancy Kirk-Gormley. She is a victim that had been beaten for ten years, and finally left home herself. Another important development of 1973, was the founding of Rainbow Retreat in Phoenix, Arizona. This was the first shelter for battered women in the United States. Since that time, over 300 other shelters have been created for battered women. This number, however, is inadequate for the number of battered women in the country. [26]

In 1975 the National Organization of Women took a vote at their national conference, and proclaimed marital violence a major issue and established a National Task Force on Battered Women and Household Violence. [27] Throughout this period, individual states were passing legislation, and setting up shelters, counseling programs, and relief programs for victims of domestic violence. In 1976 an International Tribunal on Crimes Against Women was held in Brussels in which women from all over the world gave testimony about the problems they faced in dealing with spouse abuse. Many women who had been beaten gave testimony about how they tried to leave their homes but had no place to go and no support.

An interesting court case came up in 1976 in New York City. A class action suit was filed against New York City Police Department, New York Department of Probation, and clerks of Family Court. The case, Bruno vs. Codd, stated that women were denied the legal protection and assistance that they were entitled to under state law. They charged that the police refused to arrest their assailant husbands because they were married. They also said the court denied petitions for civil protection orders in Family Court. In June of 1978, the case against the police was settled but the other two suits are still unsettled.

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Another case noteworthy was in 1974 in Cleveland, Ohio. In the case of Raquez vs. Chandler the plaintiffs or victims, brought a class action suit for "declaratory and injunctive relief" in Federal Court against the prosecutors of Cleveland, Ohio for refusing to initiate prosecutions against men for crimes allegedly committed by them against their wives, former wives, girlfriends, and former girlfriends. Their claim was based on the First Amendment right of access to a court petiton and the 14th Amendment right to due process and equal protection under the law. The result was that the prosecutors of Cleveland, Ohio issued a decree that the prosecutors will review each case on its own merit. [29]

These two cases are important landmarks in the history of domestic violence. Women are beginning to come together and speak out in an organized manner to get the protection and rights they want. Legislation is constantly changing as spouse abuse continues to increase in public awareness. The newspapers report almost daily on the changing policies in this area. In April of 1982, the Florida Supreme Court upheld a common law provision that "prevents abused spouses from suing their mates". Justice Ben Overton said that abolishing the doctrine of spouse immunity would be "detrimental to the family as a whole". The ruling came from a case in Jacksonville in which a woman accused her husband of false imprisonment and "abuse of process". [30]

These rules are an example of the changing pattern of regulations that are being made everyday. As political administrations change, the economy worsens, and lobbying efforts freeze, programs that were just beginning, are slowly coming to an end.

What options does a victim of domestic violence have? What social, and legal choices are available? As earlier stated, each state has their own guidelines. Every state does have some similarity to programs and laws dealing with spouse abuse. Federal social policies and programs are made available to every state and congressional legislation has affected the handling of this problem. Certain alternatives are currently available to victims of spouse abuse. How accessible these options are, and how effective these policies are, is a matter of opinion.

When someone has been physically abused by their spouse, they seek help at a point of crisis in their lives. When someone is in crisis, they normally do not 1)take precautionary measures and 2) do not distinguish a preference in service. They are in a state of emergency and they want help fast. The majority of services for battered spouses are divided into two categories: legal and social. True the two interact with one another but their services are clearly distinguished. As we professionals in the area of provision of service take a look at the basic types of help, just keep in mind how someone at a point of crisis and confusion feels. "Citizens rarely understand the subtleties of the laws that affect them. They generally know that assault and battery are crimes against persons, and that laws do exist to protect people from these crimes. Most people expect that should they be victimized by violent behavior, the law will be enforced on their behalf." [31] The one agency throughout the country that is open 24 hours a day is the police or sheriff. When a battered person calls the police, they expect immediate relief. The attitude of the police is one of the most important factors in domestic violence. Many police stations make domestic violence a low priority call and don't show or take hours to answer the call. Some police officers make their own interpretation of the law and do not offer the options available to victims. Some police officers and sheriffs interpret the law and give misinformed advice to people. There is a reluctance on the part of police to answer domestic violence calls. Maybe because of the fear of an escalation of violence, or possibly becuase the individual officer has not resolved the issue of spouse abuse as crime for him/her self. There appears to be greater co-operation by the police when accompanying a victim to a shelter. They may feel better knowing the person has decided to leave the violent situation, or it could be relief knowing this assignment involves less risk. Often the police act as mediators to try to settle the situation. Although the police have not been favored in the helping process by victims, new training programs are starting all over the country to sensitize the police to the fear and anguish a victim feels and to encourage a co-operative working relationship with the social service community.

The next place a victim turns to is the law. Often a battered spouse will go directly to the legal system without attending to their medical needs. The law is also divided into two areas, civil and criminal. The choice of which course of legal action to take can be crucial to a victim's safety.

In every state it is now against the law to assault your spouse or any family member. Though the laws vary in scope from state to state, criminal prosecution is available in every state. For most states the crime of domestic violence is a misdemeanor. That means it is a crime for which the penalty does not exceed one year in prison. There is great variance to this however. The prosecutor is the person who decides if a person must formally answer a charge, and what those charges will be. It may not only be domestic violence, but other charges such as assault, trespass, menacing threats or other charges. Any person has the right to file a complaint; the prosecutor decides which charges to formally pursue. This is called prosecutional discretion.[32] If the decision is made to file a criminal complaint, any number of the following steps in the criminal procedure can take place:

1) arrest
2) filing a complaint - this is often done before
#1 3) filing a charge
4) arraignment and preliminary hearings
5) trial

6) plea bargaining
7) sentencing
8) diversion - mediation
9) peace bond or restraining order

These procedures may vary in order from state to state. This, remember, is a general look at the criminal procedure. Often people think that by making a complaint, the person accused of the charge will automatically be put away forever. Our judicial system does not allow this to happen and the criminal process is long and confusing. Often a case can take anywhere between 30 days to a year before the case is settled in criminal court. Many people turn to the criminal court because they do not know where else to go. Others stay away because they are economically dependent on the assailant. Some people are afraid that if an arrest is made, the defendant will get out on bail and seek a violent revenge. This is a very real fear and often happens. It is not to say that spouse abusers are immune to criminal prosecution. Cases are being tried everyday and as the law becomes more familiar to people, the better the chances for a successful trial are.

If the criminal system is not the course of action a person chooses to pursue, then civil relief is a possibility. Civil procedures usually are held in Family Court (in some states Juvenile Court) and more often than not, require an attorney's assistance. If one cannot afford an attorney, public legal aid is available through the Federal Department of Justice and local and state funds, but the waiting lists for these services is very long. It is not uncommon to have a six to eight month waiting list at one legal aid center.

The most common form of civil relief (meaning non-criminal) now enacted to deal with domestic violence is a court order to do something or have something stopped. This remedy, available for the injured parties, is called a restraining order, or a civil protection order. The contents of these order vary in scope from state to state but generally they order the abuser away from the household, school and place of employment. Some orders may include financial support while remaining away, some may order mandatory counselling and payment of medical expenses. Also there is a variance as to who the order is issued to protect. The states may specify as to if the parties must be married, living together, related in any way or have had a previous relationship with one another. If the order is violated, then in most cases the violation is a criminal charge or constitutes contempt of court and either civil or criminal contempt actions may proceed. [33] The sentence for this can be anywhere from 30 days to 6 months in jail and/or $1,000 fine.

The protection order is not the only civil alternative. There are a few other courses of action a person may take. They are:

Tort action
Peace bond
Psychiatric commitment of defendant
Legal separation or divorce [34]

The legal process to receiving assistance to alter a violent situation in a household is confusing, and frightening. In order to receive the help one needs and has a right to, one must be a well informed, assertive, well documented victim. This writer does not know of too many victims of spouse abuse that meet this profile. Often the "red tape" that one must go through turns people away from using the system. The process of filing domestic violent actions is new to the legal and judicial systems, and although time is not to blame for attitudes and judgments made in the legal system, it is to account for some of the inefficiencies and complexities of the issue.

Another side of the helping process which has grown over the past decade is the social service programs to aid victims of domestic violence. Social policies have drawn the attention on all levels of government. The Federal Government has involved itself in various aspects of social service. Much of their efforts have been in response to the public pressure put on legislators to address the issue.

In the spring of 1979, Joseph Califano, who was Secretary of Health, Education and Welfare, established an Office on Domestic Violence within the agency. The purpose of this office was to develop a national clearing house to collect, and give out data on domestic violence. [35] Working with the Law Enforcement Assistance Administration, the office funded a family violence research project at the Center for Women's Policy

Studies in Washington, D. C. The project gives technical assistance on all aspects of the problem of souse abuse. The center also funds a newsletter called, "Response". In 1980 the Office of Domestic Violence used $1.2 million in programs for technical assistance to projects on spouse abuse.[36] The office no longer is in existence.

Using different departments, the Federal Government is beginning to offer assistance in a number of areas of need.

The Community Development Block Grant Program is now the primary source of Federal funds to local governments to help urban communities. Block grants are given to local governments to meet specific needs of the communities.

The Department of Housing and Urban Development, under Title I is able to use this money to give funds to towns to provide housing for persons in low and moderate income levels. This money may also be used for halfway houses, group homes and shelters.[37] There are currently 300 shelters in the United States today. Many more are needed to meet the needs of spouses seeking emergency shelter. Experts and victims agree, housing is one of the worst problems facing victims of domestic violence today.

Title XX programs, under the Department of Health and Human Services provide money to states for social services for public assistance recipients and also prevention of "neglect, abuse or exploitation of children and adults".[38] This means that the states must submit an annual plan to the Federal Government for reimbursement of services to low income persons and those in need of protection services. Services included are crisis intervention programs, information and referral services, counselling, emergency shelter, legal assistance and day care. [39]

The Department of Labor programs are vailable for state reimbursement to aid domestic violence victims. The Women's Bureau responds to requests of information. Regarding careers, employment, training, legal rights and day care. Title XI better known as CETA gives funding for employment of staff for public service. These employees are given jobs in times of high unemployment. The people often are given jobs in comprehensive programs for victims of domestic violence. The one catch is that these funds are only available for one year, and then funding must be sought again. Title I gives money for training the economically disadvantaged. This also includes training for victims of domestic violence. [40]

The Department of Justice has been involved in helping battered spouses since 1969. The Law Enforcement Assistance Administration of the agency has given over $15 million dollars in assistance to programs dealing with domestic violence. Another legal service that assists local legal assistance programs is the Legal Services Corporation. This is an independent corporation governed by a board appointed by the President and oonfirmed by the Senate. These programs are often known as legal aid and over 900 branches [41] are throughout the country today. Victims of domestic violence can get an attorney's services for the civil procedures needed through these programs. This service however has been recommended for being abolished in the 1982 budget.

Many states have emergency assistance available through AFDC programs. Eligibility and the amount of assistance is administered in each state individually. Sometimes documentation, not available at a point of crisis (leaving the house) is required and not available from the applicant. These programs vary from state to state as does the flexibility of the different departments of social service. Food stamps are also available even when the victim is residing in the shelter.

Several bills have been introduced to Congress but none have made it through both houses. The Milkuski Bill of 1977 proposed a national clearing house for domestic violence as well as a hotline and an interagency council that would meet four times a year to discuss the problems people working in different areas of service faced. The Domestic Violence Prevention and Service Act, H.R. 2977, would have provided $65 million over a three year period for various agencies and non-profit organizations for many services such as technical assistance and training. The bill did not receive approval at the conference stage of the bill process.[43]

Data collection laws are also being enacted to that the needed statistics can be documented.[44]

Programs came and go with the budget cuts, new legislators, and changes in social policies. One thing remains clear and that is more programs are needed.

One new policy concept that has grown in popularity over the years is the concept of mediation. Great controversy exists as to whether or not domestic violence disputes should be mediated. Mediation is the process by which both parties sit down with a trained mediator and try to resolve the problem or come to some kind of agreement on the dispute. Some people argue that mediation "takes the criminality out of spouse beating, in essence telling society that this type of violence is not a crime."[45] Others advocate that it is a place where two people can ventilate feelings and come to a workable agreement that the two parties feel comfortable with. Some behavior experts believe that the person who has been abused has the greatest burden. They say the victim should not be made to feel that they have caused the abuse. It is the individual problem of the abuser. The programs have been criticized for being "dumping grounds for prosecutors" who prefer not to deal with domestic violence cases. Other critics say that the use of mediation in spouse abuse cases is a violation of a person's right to due process.

On the other hand, some people feel that mediation in domestic violence disputes is a helpful, valuable way to resolve a problem. It encourages communication between the parties and lets the two people be actively involved in the decision making process. It is very easy for a judge, police person, or social worker to say, "Well, if things are violent, get out of the situation. For the victim of spouse abuse, it is not easy. There are a number of things to consider:

1) Financially someone may not be able to leave
2) Fear of revenge by the abuser
3) Fear that the abusing spouse may try to take the children
4) Fear of being alone, independent and self-sufficient
5) Fear of breaking a pattern of violence that not only is in their family but in the households of their sisters, mothers and friends
6) The feelings of love that a person may feel even though they are abused

Mediation provides an outlet by which rules and agreements can be made that both parties feel they can live with. It is a way of doing something constructive about a violent situation when the victim chooses to remain in the home. Mediation programs combine the social and legal issues so that both areas of the problem are addressed. In some mediation centers such as the Columbus Mediation Night Prosecutor Program, a social worker works with the legal personnel so that both the social, emotional and legal needs can be addressed in an informative professional way. Often a referral network is established with social agencies in [illegible] community so that referrals can be made directly from the program. Mediators are taught crisis intervention skills, and active listening techniques to approach the situation with empathy and control. With the civil and criminal procedures so time consuming and confusing and when often those persons a victim feels will be helpful, are not, then alternatives within the system are needed. Mediation, in this writer's opinion is that type of alternative. True, it does not work in all cases. Some cases are appropriate and others are not. Mediation does offer a concrete choice in the helping system. The choice of mediation should be made by the person involved in the dispute and it should be an option, not a last resort. Mediation does not take the blame of violent behavior away from the abuser; it provides an alternative for the person being abused to look at. There are many victims of domestic violence who want to have their spouse prosecuted for the assault, and many cases are too dangerous for mediation, but for those spouses who are unsure about proceeding criminally with the charge, mediation is appropriate and useful.

Many more services are needed in the area of domestic violence. More housing, hotlines, referral services, financial and legal assistance must be provided for people caught in the web of spouse abuse. Training different professionals to be sensitive to this issue continues to be a gap needed to be filled. Social workers must familiarize themselves with the ins and outs of the legal system so they can guide clients through it. Social workers must get to know judges, police, and prosecutors and see them as part of the helping system.

If you don't think someone is dealing with your client correctly, show them how to do it better. I do not feel that people want to intentionally frighten others away from the legal services; I think they too are frustrated with the system and don't know alternative ways of approaching the issue. Show them, offer suggestions, and give them some of your expertise so that they can learn.

Legal professionals too must become acquainted with the social service system. Visit a shelter, talk to social service personnel to know the feelings associated with the violence. Get to know some of the services available in the community so that when someone says they have been to the community mental health center, or a support group, you know what they are talking about. Explain the system as you know it to others; your insight is invaluable and social service providers need to know how things work from your point of view.

The problem of domestic violence can not be separated into the legal side and the social side. Both parts of the problem are so intertwined. Social and legal policy makers must work together. Legislation and policies have to be made with both groups' input. Policy makers must see the problem of domestic violence as a growing violent epidemic and must be viewed as a problem that society has a responsibility to address. With funding being cut from projects everywhere social and legal professionals must come together in an organized manner and work hard to lobby to insure programs and services remain active in the community.

This writer has worked as a social worker in the legal system. My suggestions are not ideals drawn out of a hat but rather things I saw accomplished. I saw changes in my attitude and in others by working together. I felt I was part of an entire helping system that was working to clear up confusion about a complex network of service providers. I know that it can be done and I am optimistic about the future of social and legal policy. Domestic violence is a large social problem that has haunted our history for thousands of years. The problem may not change immediately but the way people look at it can.

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THE ROLE OF SHELTER STAFF IN MEDIATION

by

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INTRODUCTION:

This workshop is designed to give an overview of how mediation programs and shelters can assist one another to better serve the population in need. A brief overview of types of shelters, roles of shelter staff and tips on working with shelters will be discussed.

What is a shelter? Webster's Dictionary defines it as a place or structure giving protection, a place of refuge. Shelters for victims of domestic violence are generally thought of as safe-housing facilities. It cannot be assumed that all shelters are alike. Some provide shelter services in "safe houses" or houses provided by volunteers in the community, while others provide sheltering at a specific agency.

Who can receive services from a shelter varies. Some provide programming only for the female victim while others provide services to all involved parties. Male children over the age of six may or may not be sheltered. At some shelters it is mandatory for the woman to file for divorce or criminal charges against the beater. The philosophy of a shelter is a key to the types of services provided and the orientation towards women, men and families. The philosophy directly affects the treatment or manner in which services will be delivered. A shelter whose philosophy states that males are the cause of violence is going to provide different services from a shelter which stresses that violence occurs when two parties are trapped and do not know alternatives to violence.

In order to most effectively work with a shelter, mediation programs must be aware of their own needs such as education of domestic violence problems, counseling for families or housing, as well as the shelters needs. Staff from these agencies should become knowledgeable about one another. Meetings to discuss agency purpose, philosophy, table of organizations, funding bases (and their restrictions), how each party perceives themselves working together are all necessary to have a cooperative relationship. A range of potential services or ways to interact can then be developed. Staff of both programs should receive in-service training regarding the other agency. The more clearly defined the roles and responsibilities of each agency are articulated, the less complication and better coordination for the client will take place. The roles and responsibilities should be written in an affiliation agreement.

Below is an outline which is to be expanded upon at the workshop:

OUTLINE OF PRESENTATION

1. What is a Shelter
   - philosophy
     - confidentiality
     - treatment
     - purpose
   - population served
     - women
     - men

children

extended family

- services

  sheltering

  counseling

  support

  children's programs

  follow-up

  advocacy

  education

II. The Relationship of Shelter Staff to a Mediation Program

- Staffing

  Director - working agreements, policies, public relations, funding, needs assessment

  Advocate - work with clients to get necessary services, clothing, food, housing, transportation

  Counselor - works with individual on emotional needs, client decision making; can work with family or individual

III. Establishing a Working Relationship with a Shelter

- talk face to face; learn about each agency's philosophy, purpose and funding

- determine service needs

  education

  advocacy

  housing

  counseling

- determine available resources
- write an affiliation agreement
  - outline roles of each agency
  - contact persons
  - hours of operation
  - client target population

SAMPLE

AFFILIATION AGREEMENT

BETWEEN

MEDIATION PROGRAM, U.S.A.

AND

DOMESTIC VIOLENCE CENTER, U.S.A.

The purpose of the Mediation Program U.S.A. is to provide rapid access in a neutral setting for parties to discuss their grievances in an attempt to reach resolution out of court.

The purpose of Domestic Violence Center, U.S.A. is to prevent and treat families affected by domestic violence.

It is agreed by and between Mediation Program, U.S.A. and Domestic Violence Center, U.S.A. as follows:

I. Mediation Program, U.S.A. agrees to:

-- assess and make appropriate referral

-- provide pertinent case information

-- provide two training sessions per year to Domestic Violence Center, U.S.A. regarding the role of mediation in domestic violence and how Mediation Program, U.S.A. operates

-- designate Sally Smith as staff contact person for case related questions

II. Domestic Violence Center, U.S.A. agrees to:

-- accept appropriate referrals for Mediation Program, U.S.A.

-- designate Mark Jones as staff person responsible for case related information

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-- provide bi-monthly in-service training to Mediation Program, U.S.A

on: shelter services

alcoholism and domestic violence

the cycle of violence

prevention of domestic violence

III. This Agreement is effective upon its execution by Mediation Program, U.S.A. and Domestic Violence Center, U.S.A.

IV. This Agreement may be terminated by a 14-day written notification from either party.

DIRECTOR, MEDIATION PROGRAM, U.S.A. DATE

DIRECTOR, DOMESTIC VIOLENCE CENTER, U.S.A. DATE

CHAPTER THREE:

PARENT-CHILD DISPUTE RESOLUTION

FAMILY MEDIATION IN PARENT-CHILD DISPUTES: A LEGAL JUSTIFICATION

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Few subjects in the field of juvenile justice have generated as much controversy as the court and child welfare system's handling of "status offenders" (formerly widely referred to as "wayward" youth). Many of these young people are labeled as "disobedient" or "ungovernable" by their parents, and parents commonly initiate petitions in the judicial system seeking the aid of the court in controlling their child's misbehavior. In approximately 28 states, a parent can initiate a court proceeding against their child for being incorrigible, unruly, beyond control, unmanageable, etc. In an even greater number of states, the parent may initiate court action because their child has run away from home (even on only one occasion). In one study, it was found that 81% of all status offender petitions filed in New York City family courts were in fact filed by parents against their children (Andrews and Cohn, 1977).

It has been estimated that approximately 600,000 status offense cases are handled by the juvenile justice system annually, representing 10-60% of juvenile court caseloads and an estimated 40% of all juvenile court dispositions (Sarri, 1978). Regardless of how one feels about the propriety of handling these cases in the courts, there are certain undisputed facts which strongly suggest that some alternative to judicial action should be readily available in these (to use one old legal term) "stubborn child" cases. First of all, the rise in serious crimes committed by juveniles clearly warrants the juvenile court system having more time to address delinquency proceedings (cases in which children are alleged to have committed criminal acts, rather than "non-criminal misbehavior").

Secondly, helpless and frustrated parents frequently turn to a juvenile court and expect a judge to solve a discipline problem, set limits on a child, or give an ultimatum ("mind what your parents say or I'll put you away"). The latter option has too often been exercised; in the past, more than one-third of all children held in secure detention were status offenders, and 23% of the boys and 70% of the girls committed each year to juvenile correctional institutions have been adjudicated status offenders.

Over the past twenty years, there has been considerable reform of juvenile status offender laws. There has been a reduction in the number of such children sent by the courts to secure detention centers and "training" or "reform" schools (in order to comply with the Juvenile Justice and Delinquency Prevention Act, 42 U.S.C. §5601 et seq.). The classification of these children has also been altered, and they are less likely to be characterized as delinquent or wayward youth. They are now often labeled children, minors, or persons "in need of supervision" or "in need of services" (or CHINS, MINS, PINS, or other acronyms). In a few states, these children can no longer be brought before the courts at all (although in some of these states there are still exceptions to this general rule).

For the most part, however, it is still possible for parents to bring their "CHINS" to court. These children, most often from low income families, could frequently be found to meet the statutory definition of "abused" or "neglected" children, but are nevertheless penalized with the stigma that they are the ones "at fault." As more social service agencies, rather than youth corrections departments, begin to work with these children, they are finding that the courts are generally powerless to remedy the problems which underlie a "CHINS petition," and that most cases reflect a deep-seated family dysfunction which can not be resolved through narrowly focusing on the misbehavior of the child.

In 1977 the *Juvenile Justice Standards Project* of the Institute of Judicial Administration and American Bar Association, recognizing these factors, issued a Tentative Draft of *Standards Relating to Noncriminal Misbehavior*. The House of Delegates of the A.B.A., in February, 1982, "deferred action" on this volume, and it has thus not become official Association policy. However, its suggestion that the "ungovernability" of a child *not* constitute a ground for asserting juvenile court jurisdiction over that child has been echoed by the position of such diverse groups as the National Council on Crime and Delinquency, the National Association of Counties, the National Council of Jewish Women, and the American Legion. This principle was also incorporated into a model act developed by the U.S. Department of Health, Education and Welfare, as well as standards of the U.S. National Advisory Commission on Criminal Justice Standards and Goals.

Although the *Juvenile Justice Standards'* central point may have been (and continues to be) hotly contested, another section of this volume would find broad support among those both supportive of and opposed to juvenile court jurisdiction in this area. It reads:

> "A broad spectrum of services should be provided which are reasonably designed to assist a juvenile in conflict with his or her family to resolve their conflicts." (4.1)

Despite this common sense suggestion, a review of both court processing and community-based programs for status offenders reflects that such broad services are seldom available, especially those to help the family "resolve their conflicts." Too frequently, the parent-child dispute is handled by the court at both the adjudicatory and dispositional phases of the case in a manner generally indistinguishable from a delinquency proceeding.

It has been noted that intake decisions on status offense petitions in the juvenile court are often governed by a perception of what community resources are available to deal with the problem. In addition, quite a few cases are closed by court intake officers without referral to the judge because it is thought that the family can "work their own problem out." However, where the parent-child difficulties are more complex, the parents appear particularly angry and frustrated, or the child is seen as "beyond control", most courts have resorted to such traditional approaches used in delinquency cases as detention, formal adjudication, probation, and institutionalization or placement.

Community-based programs for status offenders have largely been devoted to runaway services, residential care, or youth counseling services. Many successful programs have focused on diversion from the court system or alternatives to incarceration. Yet, until recently they have rarely been family-focused. This is fascinating, because even though laws providing for punishment (by public flogging) of young children for disobedience and disrespect of their parents date back as early as 1654, in early America it was usually the family itself which managed and resolved these problems. Over the years, we have apparently lost faith in the ability of the family to deal effectively with parent-child problems.

In a study of thirty alternative community-based residential facilities for status offenders in six cities (Linney, 1982), 80% of the facilities surveyed indicated that they provided family counseling, and 84% cited the family as the primary cause of the youth's problem behavior. Yet the researchers discovered that in actuality less than one-fifth of the programs involved families in any systematic way. Only a small number were targeting the family as part of the youth's service plan or requiring family cooperation. Based on this study, it appears that staff who work with children who are placed in detention and shelter facilities, group homes and residential treatment settings commonly "write off" the parents in the assumption that these children will never return home! An earlier study (Arthur D. Little, 1977) also acknowledged that although a great deal of lip service was paid to the notion of providing services to the family unit, there were very few family problem resolution programs.

The best hope for family involvement in these cases probably lies in work with allegedly ungovernable children who have not been removed from their homes, and especially those who are diverted to social service agencies rather than being handled by youth correction programs or the courts. However, the benefits of juvenile court-based family treatment programs have been reported on (Gruher 1979; Kogan, 1980). Some examples of states where laws now facilitate family involvement include Utah, which mandates that ungovernable youth be first handled by the State's Department of Family Services and then referred to juvenile court if counseling efforts fail; Florida, where responsibility for handling these cases has been shifted to the State's child welfare system; and Washington, where the law restricts the use of detention and provides for extensive voluntary family support services to "families who are in conflict."

It has been widely noted that there is no evidence to prove that judicial intervention as a "parent surrogate" under the court's status offense jurisdiction helps to restore harmony to dysfunctional families. The State has never really been established as an effective buttress of parental authority in handling "rebellious children," even though laws permitting its intervention have been on the books dating back to colonial times. Moreover, many believe that the opportunity for judicial intervention may actually encourage some parents to turn over their parental role to the court. What is really too often seen in these cases is a "failure to communicate" between parent and child.

In an excellent analysis of intrafamily conflict which leads to parental invocation of the court's status offense jurisdiction (Mahoney, 1977), the author views the PINS process, when initiated by a parent, as either: a) a signal of an unresolved crisis in the parent-child relationship; b) an attempt to bring real coercive authority (and the threat of a limitation of freedom) on the child; c) a device to "dump" the child (and parental responsibilities) off on the court; or d) a genuine call for help (based on a misconception of the court's power or resources). The author of that analysis believes, based on research concerning New York PINS cases, that the traditional exercise of court powers actually further promotes alienation, competition, and anger between family members.

Throughout the contemporary literature on status offenders one finds a recognition of the need to expand resources which provide meaningful family crisis intervention and counseling services. Recently we have begun to receive reports from the first true parent-child conflict resolution programs involving professional counselors and/or community mediators.

These new programs are reporting remarkable success (Wixted, 1982; Shaw, 1982; Brodsky, 1982). Another recent development is the demonstrated success of the Scottish Children's Hearings Panels. It has been suggested that this mechanism (involving lay citizen volunteers in developing legal system responses to children's misbehavior), unlike too many traditional juvenile court proceedings, involves the family in a significant way and avoids isolating the child (Martin, Fox, and Murray, 1981). Finally, state laws have begun to reflect the desirability of intervention strategies involving mediation or conciliation in divorce-related child custody disputes. It is the contention of this author that the same type of legislative reforms must be considered in the area of parent-child problems.

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STATUS OFFENDERS: A MENTAL HEALTH PERSPECTIVE

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In terms of the need for dispute mediation, no where is the need greater than for status offenders. These youngsters are children who have been brought before the juvenile court for what have been termed "non-criminal" misbehavior. Their offenses include such things as being runaways, truants from school, exhibiting immoral conduct, and being beyond parental control, which is termed being "incorrigible" or "ungovernable". More than a decade has gone by since the dispute over how to handle these juveniles began. The argument concerns the place or places where these youngsters should be handled. The two opposing positions are both contained in the label of status offender. The word "status" is indicative of the fact that these juveniles are being brought to the attention of the criminal justice system - i.e. the court, not because of their behavior so much as because of their "status". In this sense, the word status is indicative of the fact that these are minors who are showing signs of difficulties in adjustment and are in need of some kind of intervention. Those who focus their beliefs on the "status" part of the term believe that the juvenile court is not the appropriate place for these youngsters. Rather, the problems with their living situation and their adjustment to their youth should be handled outside of the courts. On the other side of the issue are those who believe that these youngsters are, in fact, "offenders". They perceive these children as having broken rules, albeit those of their parents or the school system rather than committing acts which would be crimes if they were adults. Nonetheless, based on the belief that children need supervision, these proponents assume more of a "parens patriae" position and espouse the belief that these children have committed "crimes" for their age and therefore should come under the jurisdiction of the juvenile court.

Numerous articles have been written by all manner of people who are involved either directly or indirectly with the juvenile court system. This group of people includes not only judges and legal scholars, but also parole officers, project directors, and members of various advisory and legislative bodies. The vast majority of what has been written has been from a legal, ethical, or moral viewpoint. Some of the writings discuss psychosocial aspects of the issue as well, although good research in this area seems to be deficient. Nonetheless, some mental health personnel have also contributed their viewpoints, either based on personal experience, research, or theory.

This paper is designed to present the reader with the various agruments that have been put forth by both sides in defense of their position. Each of the claims and counter claims will be addressed from a mental health standpoint. The purpose in doing so is to familiarize the reader with the emotional problems and needs of these children to allow for an informed approach to any mediation activities that the reader may engage in. As will hopefully become apparent, the position of this author is that the most important issue is to see that these children get proper psychiatric evaluation and disposition. The issue of where these services are provided seems to be of secondary importance, especially given that in many instances, little or no service has been provided to these children either inside or outside the court system. Given this perspective, the arguments will merely be stated, without any discussion from a legal standpoint. The discussion of each issue will be limited to the mental health perspective.

THE Arguments Against Retention in the Juvenile Court

1) Status offenses are nothing more than normal adolescent behavior and therefore status offenders are merely showing the signs of normal adolescent growth. Therefore, they should not be prosecuted for this.

This statement is both true and false. The behaviors for which these children are brought before the court may be and, in fact, are behaviors shown by "normal" adolescents. At any given time, an adolescent who is developing adequately may rail at his or her parents, become so frustrated that he or she leaves home for a short period of time, or even skip a class or two in school. However, these behaviors are also shown by adolescents who are having problems. The difficulty with the "status offenses" is that they do not differentiate normal from abnormal adolescents. Both categories of children may engage in the same behavior. The difference is in the frequency and severity of the problem and also in the intrapsychic and intrafamilial dynamics that exist. There is evidence from many sectors that status offenders are not normal adolescents. For example, juvenile court probation officers frequently find these children much more difficult to deal with than juvenile delinquents. Also, of note, is that these children frequently have been incarcerated in the past. Although one might hypothesize that the reason for this is that judges have not attended sufficiently to investigation of the case, an alternative, and perhaps more reasonable hypothesis is that judges are impressed by the severity of these children's problematic behavior. From a mental health standpoint, we know that a number of these children are educationally deficient. They skip school because they are underachieving. Their underachievement may be due to sub-normal intelligence, the existance of learning disability, or a syndrome which has previously been called hyperactivity and which is now designiated "attention deficit disorder". Moreover, we know that these children frequently are reacting to extreme family problems. Female adolescents most often show up in the status offender category of being a runaway. Some of these girls are fleeing incestuous situations. Abuse, neglect, and alcohol abuse on the part of the parents are other problems that may exist in the family. From the standpoint of a psychiatric diagnosis, these children span a wide range of diagnostic categories, including impulse disorder, conduct disorder, depression, drug abuse or addiction, and even psychosis. Thus, to dismiss these children from the juvenile court system as being normal would be a grave injustice to them as it may well result in them merely being returned to the same problematic situation without the assistance of either evaluation or treatment. The American Psychiatric Association Counsel on Children, Adolescents, and Their Families, in responding to the Juvenile Justice Standards Project volume on Non-Criminal Misbehavior suggested that the status offenses be better defined and suggested the following:

a. Truancy that is severe and unresolved by the school procedures described in the Standards on Schools.

b. Runaway behavior that is prolonged in duration or repeated and endangers the safety and security of the juvenile and has not responded to voluntary reconciliation services.

c. Overt acts of aggression within the family, school, or community that do not violate criminal Statutes but do seriously endanger persons or property.

d. Overt acts of serious substance abuse, but not limited to, drugs and alcohol.

e. Sexual behavior that results in exploitation or endangerment of the individual juvenile.[1]

2) Labeling a child as a status offender causes problems in and of itself in that the child will then see himself in a more negative light and may then behave in such a way as to prove that he fits the label.

This argument may well hold some truth and certainly it is generally advantageous not to label someone unnessarily. On the other hand it seems likely that these children have already labeled themselves or been labeled by others such as teachers and parents. Their self perception is already likely to be quite negative and another negative label by another adult agency may not have much of an impact on them. Is the term "status-offender" any worse than those of "rotten kid", "no good", "stupid", or "lazy", or "whore"?

It also can be a problem that the label of status offender can lead to being further labeled as a juvenile delinquent even without any criminal conduct. This can occur in those jurisdictions where a violation of probation by a status offender automatically makes him a juvenile delinquent because such a violation of probation is a crime. This situation takes the problem of labeling one step further and may well be unnecessary in that it is damaging without being helpful.

As noted in number one above, these juveniles are in need of service. That is the primary need for many of them. If being labeled as a status offender is the price that must be paid in order to obtain service, then perhaps it is a necessary evil. However, it seems unlikely that the change in label from status offender to juvenile delinquent would lead to any alteration in services and thus, in this situation, the negative effect of the label would outweigh the gain.

3) The status offender statutes, as written, are inordinately vague such that the child cannot defend himself against the charges.

This may be true from a legal standpoint. However, from the standpoint of the family or school, these children are well aware of the fact that they have gone beyond the bounds of acceptable behavior. The juvenile will be all too aware that he has violated community standards, even though he may not agree with the rules that have been set down. Nonetheless, even though the child may disagree with the appropriateness or validity of the rules of the family or school, he knows, or should know, that he is doing wrong. Although a lawyer might feel he would have a hard time defending a child in court, these children themselves have no difficulty finding defenses for their behavior. They may totally deny wrong doing, rationalize their behavior by projecting the blame on others, or otherwise excuse their behavior due to the intolerable situations they perceive in their environment.

4) The statutes are underinclusive in that the child is the only one brought before the court for potential punishment when others, such as parents or other caretakers, have also behaved inappropriately and are at least equally culpable.

Investigations into these children and their families have revealed that these children do indeed come from multiproblem families. As noted previously, there are problems with abuse or neglect of all sorts and alcoholism. In addition, these families frequently have financial problems that complicate day to day living. Moreover, there may be only a single parent at the head of the family, with the other parent taking a passive role if he or she is even in the household, but more likely being absent from the house much or all of the time.

In such a socioeconomic setting, regardless of how the child is handled, the family problems will remain. Thus, after the completion of whatever sentence the child is given, he or she will return to the same problematic environment and may well resume the previous unacceptable behaviors in order to cope. To deal with this problem, the concept of "families with service needs" or "families in need of service (FINS)" has been devised. Under this type of statute the whole family is involved in the court system and any or all of them would be potential candidates for intervention. Given what we know about these families, this approach makes a great deal of sense.

5) For the court to intrude into family settings for handling of a status offender is an unwarrented invasion of family privacy and autonomy.

This argument is one which is put forth by an attorney and two well-known theoriticians, Joseph Goldstein, Anna Freud, and Albert Solnit. Their position, in their book Before The Best Interests of The Child, is that "Children, on their part, react even to temporary infringment of parental autonomy with anxiety, diminishing trust, loosening of emotional ties, or an increasing tendency to be out of control. The younger the child, and the greater his own helplessness and dependence, the stronger is his need to experience his parents as his law givers-safe, reliable, all-powerful and independent. We urge, therefore, that at no stage should intrusion on any family be authorized unless probable and sufficient cause for the coercive action has been established in accord with limits prospectively and precisely defined by the legislature." [2] The authors indicate later in the footnote of their text that they will not deal specifically with the issue of status offenders, but do note that they believe that these offenses should be abolished

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as grounds for coercive state intervention.

Indeed, children do need to see their parents as described by the authors. For a court or other community agency to intervene, against the wishes of the parents, undermines that parental authority. Since this is potentially a significant problem, involvement with the court system should not be allowed to occur easily. On the other hand, the theory of a family's right to autonomy and privacy is not absolute and there are instances, which Goldstein, et al address, where court involvement is justified. This author suggests that perhaps parents who have failed otherwise may need to fall back on the authority of the juvenile court and, in such a circumstance, that extension of their authority might be appropriate.

6) Involvement of a child with the juvenile court may lead to an unnecessary separation from his parents or caretaker.

This is an extension of argument number five. To the extent that there is interference with parental autonomy, there will be a further diminution of any positive relationship between the juvenile and his parent. Should such interference lead to unnecessary incarceration, and thus separation from the parents, this deterioration of the relationship may be magnified. The potential for such separation is inherent in the proceedings of the juvenile court, from the time that the child is first "apprehended" by a police officer. The child may be placed in a detention facility until the parents can be located and may remain there during the process of evaluation, trial, and may be further detained in a training school as his punishment after adjudication. To the extent that any or all of these separations are unnecessary or illconceived, the process becomes destructive. For example, the child who is kept in detention for being "incorrigible" rather than having a rapid return to the family achieved with crisis intervention counseling will, in general, be harmed to a greater extent than the child who rapidly is reunited with the parents and a rapid evaluation and is undertaken with service being supplied. A compounding factor to this problem is that younger children have a much different sense of time from adults. A separation in a strange and threatening setting may be only mildly traumatic to an adult, but can be quite upsetting to a younger child.

7) Placing a child in the courtroom in the role of a defendent is traumatic and unnecessarily so for these children.

Although no known studies have been done in this area regarding status offenders, it seems reasonable to assume that the process of having to face a judge in a court room will be stressful for a minor. Furthermore, the younger the child is (from a developmental standpoint as well as that of chronologic age), the more stressful the experience will be. One might posit that such an experience is akin to putting the fear of God into a juvenile. Although this is possible, it is unlikely that doing so will, in and of itself, have any corrective effect on these children, especially given the fact that for a number of them, their focus on life is very much oriented to the here and now and that as soon as the experience is over, they will forget (repress) the scared feeling such that the only feeling that remains conscious will be that of resentment. (There has been evidence put forth that juveniles can be deterred from further criminal activities through a "scared straight" approach that involves hearing about prison from a former or current inmate. This process may be effective in altering behavior whereas appearance in the juvenile court might not be due to the difference in the authority figure. In the case of the juvenile court, the judge is not someone they can readily identify with. On the other hand, the convict is someone who has much more likely come from a similar social and economic background which means that the juvenile is more likely to be able to see himself as following in that person's footsteps and therefore more able to respond to what he is told). Additionally, the mere appearance of the juvenile in court as a defendent is unlikely to have any positive effect should he merely be reprimanded and sent back into the same problematic living environment. Whatever positive effect the adolescent might gain from being scared in court, will likely be overwhelmed when that individual is again faced with the same problems of abusive or alcoholic parents, being scorned by them as well as by teachers, and academic failure.

8) Involvement in a juvenile court proceeding can potentially lead to institutionalization which is punitive in nature and, as such, an improper disposition for non-criminal behavior.

Indeed, from the standpoint of legal theory, it would seem that this statement is true. No community interest would be served by incarcerating these individuals since their behavior in the community was not dangerous.

From a mental health standpoint, the question is: What is to be gained by the individual or for the community by incarceration? Reasonable questions to ask are whether extensive mental health, educational, and vocational services are available to those adolescents who are sentenced to training school. If these services are available in such a setting and are available nowhere else, then perhaps the "punishment" can be valuable. At least one child psychiatrist has written about a training school program which he perceives as being helpful.[3] On the otherhand, if these services are absent or are available in a less restrictive setting, then the institutionalization may be be both inappropriate and unnecessary. Furthermore, such incarceration may serve only to further imbitter the minor.

9) Efforts on the part of the juvenile court at rehabilitation have been unsuccessful.

The conclusion drawn as a result of this statement, by those who oppose having status offenders in the juvenile justice system, is that the juvenile court should not make an effort at rehabilitation. Rather, the court should limit itself to the function that it served earlier - i.e. punishment, and only punishment for criminal acts. The problem with this argument is that there is not universal agreement that the juvenile court has failed in all of its efforts at rehabilitation. It seems far more likely that the failure of rehabilitative efforts through the juvenile court has been due to either inadequate services being provided or there being an absence of services. When services are either inadequate or lacking, it does not matter whether the juvenile is under the jurisdiction of the juvenile court or not, he will not get any help. When appropriate services are available, then juveniles should benefit, again regardless of whether they are in the juvenile justice system or out of it. An example of a successful project is the Sacramento County 601 Diversion Project which was designed to test whether juveniles charged with status offenses could be handled in a more satisfactory manner through family crisis therapy or through the traditional procedures of the juvenile court.[4] Supporters of decriminalization of the status offenders point to this project as being an example of what can be done without juvenile court involvement. Those who favor retention also point to this project, pointing out that the children involved entered the project via contact through what could be seen as a standard juvenile court intake service.

What the 601 Project demonstrated was that with appropriate intervention, there was a marked decrease in recidivism among status offenders. Hopefully, this type of project carried out not only on an experimental and short term basis, but continued over a long term would prevent recidivism among status offenders as well as progression of their activities into the area of criminal behavior.

10) These juveniles are handled discriminatorily on the basis of ethnicity, race, and/or gender.

This argument is not one that particularly deals with mental health concerns primarily. The argument is included for the purposes of completeness. It does, however, seem fair to expect that if a white child from a financially well off family is not processed beyond intake due to the fact that the parents have entered both him and themselves in a counseling program, that an economically disadvantaged black child be given the same opportunity for counseling through a public agency, without being further processed through the juvenile court, assuming all other factors are equal between the two individual children.

11) Retention of jurisdiction by the juvenile court impedes the growth of community resources.

Those who proffer this arguement hold the position that when status offenders are no longer handled by the juvenile court, that community agencies will be devised and implemented to handle these youngsters. For most cases, from a mental health standpoint, where the service is provided is not nearly as important as the fact that the service simply is provided and that services of at least equal quality would be available through the community as through the juvenile court. Unfortunately, given the current political climate, it seems unlikely that much in the way of funding for new community programs would be readily available.

THE Arguments For Retention in the Juvenile Court

1) If the Juvenile Court does not provide services to these youngsters, then no one will.

This is the opposite side of argument #11 above. In the past, it seems likely that this has been true and may well continue to be true since public agencies have been and are better able then community agencies to maintain funding for status offenders programs. Regardless of the funding issue, the mental health needs of the children need to be attended to on a twenty-four hour, seven day a week basis, particularly for this subgroup. Given that these families may enter a crisis at any time of the day or night and frequently the crisis will not be during normal working hours, any services which are provided them should optimally be available all of the time. Community agencies are more likely to be open during regular working hours and perhaps some evenings. In the other hours, either no service will be available or only a Hot-Line. The existence of a Hot-Line, although certainly helpful, will be of only limited value if it cannot provide service to the child and family within a matter of a very few hours. The Juvenile Court, on the other hand, is a twenty-four hour a day service, through the vehicle of a police officer who is always able to investigate. If necessary, the police officer can make arrangements for removal of the child from the household, temporarily. Although the placement of a juvenile in such a situation may be less than optimal, such as a detention center, the fact that service is provided in a crisis may be what is necessary. In some instances, the child may be able to be removed from the family and placed either in a shelter or foster care home until a more intensive assessment and evaluation can be made. From a practical standpoint, it seems far more reasonable to assume that should funding be cut back further, that police officers will be retained on the public payroll longer than other types of community mental health workers. Thus, there is more certainty that service can be provided in an ongoing manner if rehabilitative efforts are centered in the Juvenile Court.

2) The Juvenile Court serves to protect the interest that the public has in seeing that its young get a proper education and upbringing as well as seeing that their young are protected from becoming juvenile delinquents.

Indeed, the public does have an interest in seeing that the young of the society are brought up appropriately such that they will become productive adults. A significant part of that process is education. Although clearly not everyone who drops out of school at a young age eventually becomes a criminal, it is well known that those who populate our jails as adults have a below average level of academic achievement. Those juveniles who are school truants or are experiencing academic failure as part of their "status offense" may thus benefit from compulsory education, in a supervised setting, provided that it is delivered in an appropriate manner. These adolescents may well suffer from learning disabilities which prevent them from learning in a normal classroom setting and with usual teaching methods. If the Juvenile Court is to be of assistance to them in this regard, then a sufficient number of special education teachers must be hired by the system and available for a sufficient number of hours to provide the status offender with remedial skills.

As mentioned previously, the child and his family have multiple service need which will need to be addressed by whatever agency is chosen to serve the family. One thing that the Juvenile Court can offer that other community agencies may not be able to offer is a further degree of control for an acting out adolescent who is in crisis. If need be, a Juvenile Court judge can order a child into a residential hospital for psychiatric evaluation and can have this accomplished more easily than someone working in a community agency. This extra measure of control may well be what some adolescents require.

Also, since juvenile delinquents generally have a past history of having been status offenders, the community has an interest in having status offenders identified so that they can be watched more closely and brought under close court supervision, if need be, to prevent delinquent activities. Although this is perhaps unacceptable from the standpoint of constitutional rights, from a mental health perspective it is helpful any time a juvenile can be prevented from getting himself into further emotional turmoil.

3) The equal protection argument does not hold for children in this regard since children are young adults and should not have all of the privileges of adulthood.

Indeed, children are not adults in miniature. Childhood and adolescence involves several developmental tasks which must be accomplished in order for a child to be functional as an adult. Children need to be given both responsibility and rights appropriate to their developmental age. If parents are unable to act appropriately towards their children in this regard, with the result that the child comes to the attention of the Juvenile Court, then some measures must be taken to assist the parents in treating the child more appropriately. Again, as with many of the other arguments, the service to the parents need not be provided within the Juvenile Court.

4) Juveniles may occasionally act in such a way that their parents find it

impossible to either control them or assist them in their time of crisis. For those parents who wish to turn to the Juvenile Court for help, such Court should have some service to provide.

There are times when the behavior of some status offenders, particularly those who have been designated as "incorrigible" will become so intolerable to one or both parents, that their wish is simply to get rid of the child. These families will not seek help voluntarily through a community agency. This may not occur because the parent is unaware of a community service, does not know where to go to obtain such a service or does not know how to obtain the service. Another possible reason might be a fear of exposure for abuse of their child or a sense of embarrassment or failure that the parent wishes to continue to hide. For whatever reason, the situation evolves to the point where the parents are fed up with the child and are ready to dump him or her wherever possible. One place which has historically been utilized is the Juvenile Court. Parents may bring a child to the attention of the Court requesting that the Court "do something" with this ungovernable youngster. If the Court refuses, stating that they no longer provide such a service and instead refers the family to a public agency for guidance or counseling, such families may not follow through as they do not see any need for guidance or counseling. Their request is simply as stated, to get rid of the child. Thus, the Juvenile Court can serve a role by sheltering the child, in a foster care setting if necessary, but also by mandating some type of evaluation. Furthermore, a judge, or some other officer of the Juvenile Court, may be able to persuade the parents that an evaluation of all the family members is necessary (rather than just the juvenile) where another community mental health person might not succeed. In other words, some referral source must be available through the

Juvenile Court system to get the families started into the process of evaluation. It is likely that in the vast majority of cases having someone available to refer the family to a community agency might be sufficient. However, it also seems likely that there are other cases wherein the parent or parents will not follow through unless the force of the court system is behind the entire process.

Summary

As is readily apparent from the foregoing discussion, the mental health perspective towards the status offender is that the needs are for competent assessment and treatment based on the individual needs of the child and family, with much less regard for where the service is provided. Also, there has been a movement by the Office of Juvenile Justice and Delinquency Prevention towards separating status offenders from juvenile delinquents. Again, from a mental health perspective, this may well lead to an unnecessary duplication of services. There is, in the opinion of the author, frequently an overlap between the juvenile offender and the status offender. The overlap will be in terms of psychopathology, educational deficiences and socioeconomic background. These similiarities would dictate that the two groups of children, having the same needs, be treated in the same program.

The approach to these children that makes most sense is the family based approach wherein there is a recognition that these are indeed families in need of service, not just children or minors in need of service or supervision, although clearly the children do need assessment and services themselves. The assessments must be multi-faceted and include investigation of the home setting, such as has been provided by the classical social worker. In addition, educational investigation is necessary and a psychiatric evaluation should be included as well. Optimally, these children should be seen by physicians rather than psychologists since there are some who may be in need of medication or who have neurologic dysfunction that needs further medical evaluation.

The role of the mediator, regardless of whether that mediation takes place within or outside of the Juvenile Court, is to engage the family in the evaluation and treatment process and to see that all the members who have service needs are attended to. This is a task which requires a good deal of effort as well as competence. Certain techniques have been found useful in getting these families worked into a service system. These techniques as well as a further look at the specific needs of the children will be the topic covered in the oral presentation.

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The Children's Hearings Project: A Mediation Program for Children and Families

Sandra Wixted

Director

The Children's Hearings Project
A Program of the Massachusetts Advocacy Center

"I felt real good that Laureen had remembered certain feelings that I had," said Mrs. Smith. She and her 13-year old daughter, Laureen, were referred by a probation officer to the Children's Hearings Project to see if Laureen's living situation could be settled out of court.

Laureen had lived away from home in four different places in nine months. Her current home was with her boyfriend's family. As a result of court action in a Care and Protection proceeding, Laureen was in the custody of the state's Department of Social Services which had approved the boyfriend's house as a foster home.

In order to change the focus of the court action--from the family to her child--Mrs. Smith filed a CHINS application in the district court alleging that Laureen was a "stubborn child". At this point the probation officer referred the Smiths to the project. The social services worker concurred, hoping that the mediation offered would at least settle some problems relating to visit

As the mediation began, both mother and daughter appeared skeptical, untrusting and cool to each other. The mediators listened to their doubts about the feasibility of Laureen's return home. Not until the mediators met privately with each one, however, did some real feelings emerge.

Mrs. Smith worried about Laureen's friends, the boyfriend in particular, how late she stayed out. Laureen in turn was surprised to find out how concerned her mother was. Both were willing to try weekend visits. The written agreement included arrangements for such visits, including Laureen's promise to arrange her own transportation and to be in by ten p.m. Mrs. Smith agreed to do something special with Laureen each weekend, and both agreed to a second mediation.

The first two weekend visits went so well that both mother and daughter decided that Laureen should move home at once. They made arrangements together for her school transfer.

> At the next court hearing the case was dismissed and custody was returned to Mrs. Smith. The Department of Social Services withdrew from the case.
>
> One month after the first mediation, Mrs. Smith and Laureen returned to the Children's Hearings Project. The second mediation produced another written agreement outlining responsibilities relating to their new home life together. They left the project smiling and agreeing that mediation had helped them to talk to each other and to begin to solve their problems on their own.
> ---A Case History from the Children's Hearings Project

The Children's Hearings Project, located in Cambridge, Massachusetts, is a family mediation program for parents and children. Sponsored by the Massachusetts Advocacy Center, a public interest agency which seeks to improve the lives of children, the project serves the communities within the jurisdiction of the Cambridge and Somerville courts.

Designed as an alternative to the court, the project offers mediation to families with children who allegedly have committed a status offense or where there are allegations of abuse and neglect.[1] The project combines major components of the Scottish Children's Hearings System[2]--in particular the use of community volunteers in a panel setting--with dispute resolution techniques developed in this country.

The goal of the Children's Hearings Project is to demonstrate that mediation can give families a sense of control resolving their conflicts and encourages them to develop effective strategies for handling them. After one year of pioneering effort relating to parent and child conflict, it appears that mediation has been effective in alleviating family conflict and that the use of community volunteers has a positive impact on the parties involved.

This paper will describe the program and mediation model used by the Children's Hearings Project, the use of community volunteers, some special characteristics of parent/child mediation, and the potential for application to other family conflict situations involving children. Case histories and sample mediation agreements are included.

Program Description

Families are referred to the Children's Hearings Project by the courts, the schools, and social service agencies, including the state's Department of Social Services. Upon referral, one of two staff case coordinators arranges to meet the family, decribes the project, and seeks voluntary participation from the child, the parents, and any other person involved. This could include a school official, social worker or counselor, or a family friend, sibling, or other relative. Because other family members, siblings for instance, are often affected by or even contribute to the conflict between one child and the parents, their participation can lead to more realistic solutions. Participation by professionals who are often the main link to resources needed by the family and who are sometimes in conflict with the family, is encouraged, especially in cases involving placement or special education issues.

After the family agrees to participate, the coordinator gathers preliminary information and prepares the family for mediation. Hearings are scheduled within two weeks of the initial contact with the family and at times convenient to the family, most often in the early evening. At the hearing, a panel of two or three community volunteers mediates among the parties present. Their goal is a balanced, written agreement in which all parties - parents, children, and others - take responsibility for future actions. In some cases a second hearing is scheduled.

After the hearing, the case coordinator monitors the agreement for three months, usually by telephone. When families have agreed to services or where other kinds of coordination with agencies and schools are indicated the case coordinator follows up. Not all agreements, however, call for social services.

Panel Members

One of the most promising developments of this project is the discovery of volunteer mediators as a community resource. The advantages of using volunteers in the Scottish system as well as other dispute resolution programs are well documented. A cross-section of the community--teachers, artisans, managers, secretaries, counselors, students, lawyers, and parents--our volunteers range in age from young adult to senior citizen and are representative of the various ethnic groups--Portuguese, Black, Hispanic, Haitian--in the project's geographical area.

Age, sex, ethnicity, and experience are factors taken into consideration when matching panel members to families.

When family members realize that the volunteers support the family and listen to their concerns, this lends credibility and legitimacy to the mediation process. Youth panel members, in particular, engender a degree of trust and responsiveness from the children participating in mediation. Mediator recruitment efforts have included outreach to housing projects, schools, church groups, social service agencies, ethnic and youth organizations, advertising in local newspapers, and presentations at community meetings.

In selecting volunteers, we use criteria necessary for any good mediator - objectivity, sensitivity, understanding, and communication skills. We also look for other qualities, values, and experience which will be effective when mediators are confronted with families in conflict. One finds people who are natural mediators in their own families or other areas of their lives; individuals who through their own family experiences or involvement with others understand the dynamics of disintegrating families; many who have the concern, interest, and ability without having had the opportunity in their personal lives or work to contribute. Each panel member makes a commitment to do one hearing a month (several do more) and each receives a ten dollar stipend to cover transportation and child care expenses.

The first group of 27 volunteer panel members was trained in April, 1981 by the Crime and Justice Foundation, an agency with substantial experience in developing court mediation programs. This intensive 42-hour course was built around role play situations involving parent and child disputes. To enhance the learning experience, teenagers were brought in to play the youth roles. This became a useful way to help volunteers shed certain complex language patterns or paternalistic approaches with children that work negatively in a mediation context.

A second training of 20 volunteers in January, 1982 was conducted entirely by staff and panel members from the first group. Each training included presentations and written materials on dispute resolution and the juvenile justice and social service systems. Bimonthly follow-up training sessions have focused on such topics as teamwork among panel members, mediation strategies, confidentiality, and child abuse and neglect.

The Mediation Model

The mediation model of the Children's Hearings Project uses a modified labor management mediation model. Our model was built on the concept of having panel members (trained community volunteers) meet with families in sessions called panel hearings. Originally, three volunteers made up a panel, but now we exercise more flexibility by using two or three panel members. The terms panel members and panel hearings are interchangeable with mediators and mediation sessions and are drawn from the Scottish Children's Hearings System.

The hearing consists of a series of "public" or "joint sessions" with all family members; "private sessions" with individuals; and panel member "caucuses" to develop and coordinate strategies. During the initial joint sessions each party is given an equal opportunity to speak and express his or her view of the problem, giving the panel members an opportunity to hear the individual issues, interests, and to observe the parties' interactions with each other. The first set of private sessions serves further to increase the confidence and trust in the panel; more information is obtained; and the panel members begin to understand the issues and common concerns. It is during the private sessions that family members, especially the children, "open up", giving new information and sharing their feelings and hopes for the mediation and the future. The use of private sessions assures that the child will have an equal voice in expressing his or her interests and contributes significantly to the process of resolution.

At the end of each private session, the panel carefully checks what information the individual wants to retain as confidential and strictly respects these confidences. Panel members are careful to limit the scope of the potential agreement fairly early on in the process. Unrealistic goals are explored and those issues requiring the cooperation or agreement of individuals not at the hearing are identified and noted. Emotional difficulties better dealt with by therapy are also noted and the issue of counseling or other appropriate interventions is raised.

When the issues which can be negotiated become clear, the panel members begin working on agreement points, identifying areas of common agreement, and planning strategies to help parties come to agreement. Agreement points are checked with all family members in final private sessions. At this point, the process resembles, "shuttle diplomacy". Occasionally, panel members hold additional joint sessions before reaching agreement. If a hearing is successful in reaching agreement, it ends with a final joint session where the agreement is signed by the family and panel members. A copy of the final agreement is given to each of the parties and a copy sent to the court, _if_ formal proceedings have been initiated there.

The length of hearings varies from two to five hours. Recent hearings tend to be shorter, partly due to the increasing use of second hearings and the panel members' growing expertise. Panel members receive more information about who family members are, the school status, present involvement with other agencies, and their extent of contact with the project staff. At the start of the hearing, all family members know what information the case coordinators have told the panel members.

The types of issues addressed during hearings range from specific ones, like curfews and living arrangements, to broader ones, like the child's attitude about school or parents. Family members often discuss background information, relationships with other people besides those at the hearing (like siblings and boyfriends), previous marriages and divorces, financial problems, and school problems. While a child's attitude or a parent's marital problem cannot be mediated, the information enables panel members to have a clearer, more complete picture of the family situation and thus guides and aids them in helping the family develop agreement points which are realistic and important for them.

Agreement points cover many issues and might include, among others, chores, allowances, curfews, dating, school attendance, family time together, yelling or nagging, visitation, and jobs. Some families agree to counseling or agree to talk with the case coordinator about locating appropriate services in the community.

Although some agreement points might seem insignificant, they are important because they are issues that family members have brought to the hearing and which cause tension and fighting within the family. Panel members find that much of the information given to them has not been shared among the family members prior to mediation, and that many of the options which come up in the hearings and are then turned into agreement points, were also not thought of by the family before mediation. When concrete and specific issues can be worked out by opening up the lines of communication among family members, it can be a most significant step in reducing conflict within the family.

Case Data and Outcomes

At the present time, two-thirds of our referrals come from the two district courts in our geographical area, Cambridge and Somerville. Schools, the Department of Social

Services, and other agencies have referred the remainder. Ninety-nine cases have been referred to the project over a ten month period (June, 1981 - April, 1982). The majority of cases are in the "Stubborn Child" category (47), while the others are divided among runaways (16), truants (24), and other types, such as abuse and neglect cases. Fifty-one families have come to one panel hearing, and eight of these have come to two hearings. Agreements were reached in 80% of the hearings, with two-thirds of these agreements holding over the time they were monitored by the case coordinator.

Although a number of cases have not reached the panel hearing stage, either because of the unwillingness of the parties to participate or inappropriateness of referrals, hearings also become unnecessary when a family crisis is resolved by the initial contact with the project's staff.

We are encouraged by these early returns and the responses of families to mediation. Even where agreements are not reached, many parents withdraw their court complaints after the family has participated in the project. Because the hearings have been particularly effective in school-initiated truancy cases - both in involving school officials and working out reasonable agreements - the schools, with increasing frequency, refer cases directly to the project before going to court. Liaison work with the judges and probation staff continues to be a crucial function of the project in order to achieve our goal of diverting cases from the court process.

Special Considerations in Parent and Child Mediation

The principles and techniques which guide the mediation model at the Children's Hearings Project are consistent with those applied in non-family situations. What differentiates the parent and child model has more to do with programmatic supports than any significant alteration in the mediation model itself. To involve children in mediation, however, does raise some issues and requires emphasis on skills and principles that are special to family mediation. The section that follows focus on these special programmatic and mediation issues.

Programmatic Issues

A decision made during the planning phase of the project, and one which has proven essential, was to build in a "pre-mediation" intake and a "post-mediation" follow-up stage. Requiring a more intensive involvement by the project staff than other mediation programs we reviewed, these stages support a family's decision to participate in mediation and reinforce the benefits of their participation. However, this work by the project staff (case coordinators) whose backgrounds are in family work, mediation, and the law, is clearly different from counseling.

In some ways, the intake stage is comparable to fact-finding as well as prehearing activities in the Scottish system. Case coordinators collect information from the family about the complaints that brought them to court, previous efforts to resolve these difficulties, and other relevant background information.

In our view, special efforts are needed to insure that the family, particularly the child, understands what mediation is. Meeting separately with the child and parents, the case coordinators explore their concerns and needs. This begins to frame the issues and set expectations for the mediation. In some instances, this process alone leads to some type of resolution and a mediation becomes unnecessary.

In all cases, the case coordinators try to create a sense of trust between the family and the program. We make these efforts because we feel there is an obligation to prevent any harmful consequences to participating families and to make it a helpful process no matter what the outcome of mediation is. Although our experience shows that both children and parents are quite open to mediation and understand the basic principles within a brief period of time, the preparation lends support and significance to the family's decision to try a new approach which inevitably involves taking personal risks and assuming responsibilities which have been difficult or impossible in the past.

The follow-up to mediation includes close monitoring when an agreement has been reached and involves continuing contact with most families. In some cases the mediation agreement stipulates that the case coordinator will facilitate a family's access to services, and the case coordinator stays involved until this is accomplished. In other cases, where families are already involved in some type of community or social service and particularly in school-related matters, coordination efforts are required. And in some cases where no agreement is reached or where the agreement breaks down, the case coordinator makes special efforts to link these families to counseling agencies.

We find that many families have benefitted from mediation even when there has been no agreement. Parents are often able to see and acknowledge that the family's inability to make any kind of compromise may be due to emotional difficulties and in turn see the need for counseling rather than court intervention. Particularly difficult situations where parents are rigid, uncompromising, and angry sometimes require a more assertive posture from the project staff if the mediation has in any way been distressful for the child. The case coordinator usually arranges to meet with the child alone after the mediation in order to provide some support or referral to counseling. The coordinator also attempts to meet with the parent to recommend alternative means of help. On rare occasions we have had to consider contacting the public social services office if we feel the child has been at serious risk of being harmed or injured by the parent.

Monitoring the agreement is a useful way to review the terms with all the family members and to reinforce the positive changes in a family even when all the agreement terms are not adhered to. A typical situation was the mother who told the case coordinator that the mediation was a waste of time because the 16-year-old daughter had broken her curfew the previous weekend. When the case coordinator reviewed seven other points of the agreement, the mother acknowledged that things were better in other areas and that even she could do more to carry out her side of the agreement.

Mediation Issues

A major question raised by those who hesitate to involve children in mediation is whether a child can really engage in a process which requires an ability to articulate his concerns, to compromise, and to make commitments.

Children coming to the CHP range in age from 13 to 17 years old. It appears that most children in this age range have the intellectual and emotional capacity to understand and participate in a structured mediation process. Children do not come to our program if they choose not to participate. In the case of extreme emotional difficulties, we rule them out as candidates for the project.

Because most children in the status offense category are over 12 years old, age considerations are not a problem. When one truant child, age 7, was referred to the project, we found the real conflict was between the school and the parent who prevented the child from going to school, and we mediated the case without the child. Thus far, all our abuse and neglect cases have involved children over 12. Recognizing that children below this age have some capacity to negotiate and enter into contracting arrangements, we include younger siblings in a family mediation where it appears useful to have some agreement points between siblings, mainly around household chores and property-sharing issues.

Most training states that mediators should use simple and clear language throughout the mediation and in wording the final agreement. With children and families, this cannot be overemphasized. Wordiness and complex series of questions by the mediators can confuse and leave the parties, particularly the children, out of the discussion. Mediators need to listen carefully to language the family uses to characterize their own difficulties rather than impose their own terminology. For instance, "curfew", "chores", and "placement", easily categorize certain sets of problems, but are not always terms used by the family and can take on a labelling quality within the mediation context. Young mediators at a panel hearing are our greatest asset in overcoming these kinds of barriers.

The challenge in family mediation is to create an experience which seems fair to both the parents and child. When the agreement is completed, the child should not feel that he is the one who has to make all the changes. The parents should not feel that they have traded away their parental roles. Because of the de facto inequality of power in the parent and child relationship, the principle or creating balance in the final agreement requires special emphasis.

Application to Other Types of Family Conflict Situations

Mediation between parents and children is still in a formative stage and needs more experimentation and experience. So far, the mediation outcomes of status offender-type cases are very promising, and we believe every family identified by the courts in these situations should at least have an opportunity to choose mediation as an alternative. Although we have not yet handled a large number of neglect and abuse cases and these will not in many instances involve very young children, we feel the project has enormous potential in giving parents some control in the solution of their family difficulties. By including social workers in the mediation, opportunities to negotiate ways to improve and strengthen the parent and child relationship or to explore options and resources available to a family are expanded.

The experience of the CHP with specific types of family conflict holds promise for a broader use of mediation. For families going through divorce, where mediation has already been effective for the parents, child and parent mediation could deal with issues such as visitation schedules and joint custody. (See following article by Patrick Phear which discusses these issues and presents some initial experiences involving children in divorce mediation.)

Some specialized programs which involve children within school settings and deal with a range of conflict issues already exist. Our own positive outcomes in truancy cases, often involving school personnel in the mediation, leads us to urge broader application of mediation in school problems.

Families with adolescent children probably experience more than their share of family conflict. Even though this may be the norm, with only a small percentage of these families coming to the court's attention, many in serious difficulty turn to mental health and counseling agencies. Mental health professionals would agree that traditional therapeutic approaches are often not very effective with the "acting out" adolescent and his family, and some adaptation of a mediation/negotiation model might be considered.

* * * * *

The cases handled during the first ten months of the project have demonstrated that parent and child mediation is a sound alternative to court for a great many families. It appears that children and families view the panel hearings as a resource to help them resolve problems in a mutual way and not as a coercive power. The hearings have been designed to take the scrutiny and focus away from one party as the sole object of the proceedings and involve as equitable as possible all parties in the matter. It is evident that all participants including the children recognize that they have an equal voice in explaining the facts, expressing personal views, and negotiating the terms of the agreement.

Our hopes for the project have been strengthened by the number of parents and children who have been willing to enter the unknown territory of mediation. A process which includes several hours of communication is indeed outside the experience of most families participating in the project. Nevertheless, we have had almost no problem with people not showing up for their hearings once they have agreed to come. Even among those who may feel pressure to come because of a court referral, the majority freely express themselves and take on the responsibilities that mediated agreements stipulate.

The Children's Hearings Project is a demonstration program funded by grants from the Edna McConnell Clark Foundation, the Ford Foundation, the Robert Sterling Clark Foundation, the Florence V. Burden Foundation. A research grant from the W.T. Grant Foundation will allow us to evaluate our effort.

FOOTNOTES

1. In 1973, the Massachusetts legislature enacted a law which transferred services for status offenders from the youth correctional system to the social services system. Although the law's intent was to decriminalize the offenses of truancy, running away, and incorrigibility (in Massachusetts, "stubborn child"), the statute permits arrest of runaways, and the use of bail and detention.

Observation of court proceedings involving status offenders (Children in Need of Services or CHINS) indicates that the vast majority are there because their parents have brought them there. It appears that noncriminal misbehavior is rooted in complex family problems rather than the single-minded willfulness of a child. Nevertheless, the child is brought to court in the equivalent role of a defendent, usually in an opposing position with his or her parents. The child's behavior is the focus of an adversarial proceeding and despite the potential consequences to the child--most notably , the loss of freedom--he or she often plays a very minor role in the proceeding.

In care and protection situations as well, an adversarial hearing is required to make a finding and to determine the basis and extent of social service intervention. The increase in court proceedings relating to child protection matters is partly due to the wide acceptance of the notion that court sanctions are required to enforce social service plans or to initiate them in the first place.

Status offender cases and abuse and neglect cases not only put an increased burden on the courts, but present a critical issue as to whether so many of these cases should be before the court in the first place. Although the goal of court intervention is to protect the child, recent concern focuses on how harmful these interventions can be for the child and family, and how often the most intrusive measures of care, i.e., placement and removal of children from parental custody, are imposed.

2. In 1968 by an Act of Parliament, the juvenile justice system in Scotland changed drastically. The Children's Hearings System was established, relying heavily on community volunteers and social workers in accordance with the philosophy that most juvenile offenders need assistance, not punishment. Instead of coming to court, youthful offenders and their families appear before a three-person volunteer panel in an informal setting. Recruited and trained by professionals, the panel members hear the cases and help families to make decisions on the needs of the youngsters involved. Dispositional decisions of the panel members are implemented by the staff of the Social Work Department, a governmental agency. Where facts have been disputed or where the events involve public protection, juvenile cases (about 10%) are heard in the Sheriff's Court.

CASE STUDY #2

Pete Pedillo, 15, is assigned to a special school program which allows him to work at a daytime job and attend school from two to six p.m. His school guidance counselor suggested this alternative program when Paul had attendance problems in the regular high school program. Yet Paul continued to skip school and had no regular job.

Paul's mother reacted to his truancy by grounding Paul one week for each missed school day. She communicated with Mr. Fiske, the guidance counselor, by writing notes, since she worked full-time, was afraid to take time off, and was prohibited from making non-business phone calls at work.

Mr. Fiske considered a court action in which he would file a CHINS application alleging truancy. However, he suggested to Pete and his mother that they might try the Children's Hearings Project and that this would be Pete's last chance before he went to court. Mrs. Pedillo agreed to try the mediation offered by the Project because it would take place in the evening.

When they arrived at the Project, Mrs. Pedillo looked very tired and said she would leave in an hour to attend a meeting at her daughter's school. In the first meeting with the mediators, she spoke of her lack of trust in Pete, her concern about his school attendance, and the fact that he destroyed notes sent to her by the guidance counselor. Pete, in turn, said he was in a no-win situation since--even if he attended school regularly--he could never work off the grounded time he had accumulated at home.

In the private sessions that followed, the mediators talked with Mrs. Pedillo about her grounding rules. Although she was impatient about Paul's school and worried about his getting into trouble, she was particularly concerned about a reliable accounting of his school attendance. When Paul spoke privately to the mediators, he agreed to go to school. Acknowledging that his mother had some reasons not to trust him, Paul still complained about the grounding rules.

With the help of the Project's case coordinator who had been in touch with the school, the mediators worked with the Pedillos to come up with a written agreement with the following points: Paul would attend school; the coordinator would call the school daily for two weeks to check on the attendance; the coordinator would call Mrs. Pedillo in the evening to report on attendance; arrangements would be made after the two-week period for the school to contact the mother once a week; Mrs. Pedillo agreed to ground Pete only three days for each day of school missed.

The mediation session took two hours. After one hour, Mrs. Pedillo announced that she would stay since it was so important. That statement influenced Pete who told the mediators that it showed that his mother was concerned for him and was not leaving to attend his sister's school meeting.

After three months, Pete has not missed one day of school. He has a part-time job and has not been grounded. Both Mrs. Pedillo and Pete have said that mediation helped them to talk to each other which they now do when other difficulties arise.

CASE STUDY #3

"I'm having a hell of a time," said the father of a truant daughter when he first met with the panel members at the Children's Hearings Project. Three months earlier Mr. Mazzarellis started caring for his three daughters alone when his ex-wife remarried and moved out of the family home. She did not want the children and Mr. Mazzarellis moved back in.

Overwhelmed with his new responsibilities but trying hard, the father soon faced a rebellious daughter who stopped going to school. After an argument with her dad about school and chores, Jean, 15, ran away and stayed with a friend for two weeks. Mr. Mazzarellis met with the school personnel and agreed that a CHINS truancy action should be initiated in court.

Because the school problems appeared to related to the significant changes in the family, the judge referred the case to the Children's Hearings Project. The school guidance counselor also agreed to participate in the mediation sessions offered by the Project. Two mediation hearings were set up up—one to discuss school-related problems, another for family issues.

Both Jean's mother and father attended the two sessions along with Jean's younger sister. Aware of the family crisis, they all worked hard to reach an agreement that would support each other. In the first hearing, the guidance counselor agreed to initiate a special education evaluation the next day and ease up on strict attendance monitoring if Jean attended school regularly. Because Jean agreed to improve her school and attendance performance, Mr. Mazzarellis agreed to buy her some cowboy boots. Jean has attended school regularly since the first mediation session.

The second mediation agreement outline responsibilities for household chores. Jean's 13 year old sister actively participated in this mediation and agreed to share chores. Looking back on their participation in the project, Jean and her father agreed that the mediations had "organized everything."

Agreement for CASE HISTORY at the beginning of the paper.

FIRST HEARING

THE CHILDREN'S HEARINGS PROJECT

of the MASSACHUSETTS ADVOCACY CENTER

497 Cambridge Street, Cambridge, Massachusetts 02141
Phone: (617) 661-4700

AGREEMENT

SAMPLE

Parent(s): Mrs. Elizabeth Smith ____________________

Child: Laureen Smith

Other: ____________________ **(relationship:** ____________________**)**

We have taken part in a hearing session on January 12, 1982 **(DATE) and have agreed to the following terms and conditions:**

1. Both parties agree Laureen will begin visits home each weekend beginning January 15th.
2. Both parties agree visiting will begin at 6pm on Friday and last until Sunday afternoon.
3. Laureen agrees to arrange for transportation to and from home.
4. Mrs. Smith agrees that the family will participate in one special activity together each weekend.
5. Laureen agrees to a 10pm curfew when staying within the Somerville area. If activities are farther away, Laureen will get permission from her mother to attend.
6. Both parties agree to return to mediation on February 10, 1982

We agree the above represents a fair and reasonable settlement and further agree to follow its terms and conditions.

Signature of Parties: Laureen Smith ____________________

Mrs. Elizabeth Smith ____________________

WITNESSED

We the undersigned panel members have heard these parties resolve their differences. We have witnessed the agreement signed above.

Signature of Panel Members: Louise C. (Chairperson)

John R.

Ellen L.

Agreement for CASE HISTORY at the beginning of the paper.

SECOND HEARING

THE CHILDREN'S HEARINGS PROJECT

of the MASSACHUSETTS ADVOCACY CENTER

497 Cambridge Street, Cambridge, Massachusetts 02141
Phone: (617) 661-4700

AGREEMENT

SAMPLE

Parent(s): Mrs. Elizabeth Smith ____________________

Child: Laureen Smith

Other: ____________________ **(relationship:** ____________ **)**

We have taken part in a hearing session on February 10,1982 **(DATE) and have agreed to the following terms and conditions:**

1. Both Mrs. Smith and Laureen agree that Laureen will come home by 10:30 on Friday and Saturday and 9:00 P.M. on Sunday. Laureen will let her mother know where she is when she is out.
2. Laureen and Mrs. Smith will speak with the Case Coordinator about counseling for Laureen.
3. Laureen and Mrs. Smith agree to continue spending time together and talking together

____

We agree the above represents a fair and reasonable settlement and further agree to follow its terms and conditions.

Signature of Parties: Mrs. Elizabeth Smith ____________________

Laureen Smith ____________________

WITNESSED

We the undersigned panel members have heard these parties resolve their differences. We have witnessed the agreement signed above.

Signature of Panel Members: Louise C. **(Chairperson)**

John R.

Ellen L.

CASE HISTORY #2

THE CHILDREN'S HEARINGS PROJECT

of the MASSACHUSETTS ADVOCACY CENTER

497 Cambridge Street, Cambridge, Massachusetts 02141
Phone: (617) 661-4700

AGREEMENT

SAMPLE

Parent(s): Mrs. Barbara Pedillo ________ ____________________

Child: Pete Pedillo

Other: ____________________ **(relationship:** ____________**)**

We have taken part in a hearing session on November 12, 1981 (DATE) and have agreed to the following terms and conditions:

1. Pete agrees to attend all classes in the after school program on a regular basis.
2. Mrs. Pedillo agrees to lift grounding if Pete attends on a regular basis.
3. Pete and Mrs. Pedillo agree that grounding is lifted as soon as the Case Coordinator works out the means of monitoring Pete's school attendance.
4. Mrs. Pedillo and Pete understand that for each day Pete misses classes in school he will receive three days of weekday grounding.

____

We agree the above represents a fair and reasonable settlement and further agree to follow its terms and conditions.

Signature of Parties: Mrs. Barbara Pedillo ____________________
Pete Pedillo ____________________

WITNESSED

We the undersigned panel members have heard these parties resolve their differences. We have witnessed the agreement signed above.

Signature of Panel Members: Jonelle A. ____________ (Chairperson)
Ronald B.
____

CASE HISTORY #3
FIRST HEARING

THE CHILDREN'S HEARINGS PROJECT
of the MASSACHUSETTS ADVOCACY CENTER
497 Cambridge Street, Cambridge, Massachusetts 02141
Phone: (617) 661-4700

AGREEMENT

SAMPLE

Parent(s): Mr. Thomas Mazzarellis Mrs. Marie Taunton (mother)

Child: Jean Mazzarellis Ellen Mazzarellis (sister)

Other: Ms. Angela Johnson (relationship: Guidance Counselor

We have taken part in a hearing session on Nov. 24, 1981 (DATE) **and have agreed to the following terms and conditions:**

1. Ms. Johnson agrees to initiate a Special Education evaluation on Nov. 25, 1981.
2. Mr. and Mrs. Mazzarellis and Jean agree to participate in the Special Education evaluation.
3. Jean agrees to continue the verification of attendance process until Monday, January 18, 1982. On January 18, 1982, she will begin to attend all classes without verification; if after the two weeks she has attended without cuts, verification process will be ended after second two weeks' review.
4. Second hearing scheduled for December 16, 1981 at 7 P.M.
5. Mr. Mazzarellis agrees to buy jeans cowboy boots before Christmas.

We agree the above represents a fair and reasonable settlement and further agree to follow its terms and conditions.

Signature of Parties: Jean Mazzarellis Mr. Thomas Mazzarellis
Ms. Angela Johnson Mrs. Marie Taunton

WITNESSED

We the undersigned panel members have heard these parties resolve their differences. We have witnessed the agreement signed above.

Signature of Panel Members: Joan W. (Chairperson)
Odelaine T.
Keith M.

CASE #3
SECOND HEARING

THE CHILDREN'S HEARINGS PROJECT

of the MASSACHUSETTS ADVOCACY CENTER
497 Cambridge Street, Cambridge, Massachusetts 02141
Phone: (617) 661-4700

AGREEMENT

SAMPLE

Parent(s): Mr. Thomas Mazzarellis ______ Mrs. Marie Taunton (mother) ______

Child: Jean Mazzarellis ______ Ellen Mazzarellis (sister)

Other: ______ **(relationship:** ______**)**

We have taken part in a hearing session on Dec. 16, 1981 **and have agreed to the following terms and conditions:** (DATE)

1. Ellen will do the following chores daily: kitchen table, woodwork and fridge, put dishes away, kitchen floor and pantry, dry clothes, own room.

2. Jean will do the following chores daily: stove, wash dishes, Dad's floor, fold and sort clothes (as needed), own room.

3. Dad will do the following chores: food shopping, laundry, his own room, clean the bath 3 times a week.

4. Jean and Ellen will write up a schedule to divide equally cleaning the cat box and feeding the cat daily.

5. If Jean does not keep her end of the agreement she will stay home one day in the next weekend.

6. If Ellen does not keep her end of the agreement she will stay home the next Friday.

7. If Mr. Mazzarellis does not keep his end of the agreement he will stay home the following Saturday and Sunday night.

Agreement continued on next page:

We agree the above represents a fair and reasonable settlement and further agree to follow its terms and conditions.

Signature of Parties: Jean Mazzarellis ______ Ellen Mazzarellis ______

Mr. Thomas Mazzarellis ______ Mrs. Marie Taunton ______

WITNESSED

We the undersigned panel members have heard these parties resolve their differences. We have witnessed the agreement signed above.

Signature of Panel Members: Keith M. ______ **(Chairperson)**

Joan W. ______

______

(Agreement Continued)

Case #3
SECOND HEARING

8. Jean and Ellen agree not to borrow the other's belongings unless they ask beforehand. Each has a right to turn the other down if she so desires.

9. Jean agrees to allow Ellen to use their father's stereo in the event of a disagreement as to which channel to listen to.

10. Each person has the right to not do their chores once a week (but never twice in a row).

For Office Use Only
Record No._______________
Referral Date ___________
Case Coordinator ________

Mediating between Parents and Children

The Children's Aid Society's PINS Mediation Project

by Margaret L. Shaw, Esq., Project Director

The Children's Aid Society's PINS ("Persons in Need of Supervision") Mediation Project was developed in early 1981 to see whether community-based, mediation could offer a good alternative to the court for status offenders and their families.

The shortcomings of the court system in these cases, which involve truants, runaways, and youth beyond their parents control, have been widely recognized. The court's adversarial process, pitting child against parent and parent against child, is inappropriate for these non-criminal offenders, as is focus on the juvenile for a problem which is really a family one. In the end, there is also very little a court can do other than order placement in a non-secure facility, an order which by its nature cannot then be enforced. As a result, not only do those in the court system feel an overwhelming sense of frustration with these cases, but also these cases distract from the handling of more serious and violent offenders. In addition, the families who petition the court for help in controlling their children do not receive the kind of help they really need.

These are the kind of considerations which led to formulation of the IJA-ABA Standards for Juvenile Justice:

> A Juvenile's acts of misbehaviour, ungovernability, or unruliness which do not violate the criminal law should not constitute a ground for asserting juvenile court jurisdiction over the juvenile committing them.

It was in the hope that mediation could provide an alternative to that jurisdiction, then, that the PINS Mediation Project began.

In addition to its services, the project includes a substantial research component. Families who choose mediation are compared with a contrast group of families who pursue their PINS petitions through the normal court process. Being addressed are such questions as what kinds of families choose mediation and how do they differ from those in the contrast group? Are the service needs and expectations of the two groups significantly different? What kinds of families appear to benefit from mediation, what is the nature of that benefit, and what other kinds of services may be needed to obviate the need for families to proceed with a formal PINS process in Family Court? The results of this research will be available in July, 1982.

The Project

The PINS Mediation Project began as a pilot in two of New York City's boroughs, Manhattan and the Bronx. Referrals come from Probation Intake Officers, and Legal Aid or Corporation Counsel attorneys. A court liaison worker from the project, located right in the court building, explains mediation to the referred family. If the family agrees to participate, the worker conducts a preliminary assessment to determine the nature and extent of the problem, and assigns an appropriate mediator. If the family is in immediate crisis or some other need is present, the family can first see one of the project's two social workers.

Mediators are lay volunteers*, recruited from the communities served by the project and trained in mediation skills and techniques. They meet with the families for up to four sessions, scheduled a week apart. These sessions are held during either the day or evening at one of the Children's Aid Society's community centers located throughout Manhattan.

We have found that for mediation involving parents and children it is important to have more than one session, and that to try in the first session to reach a comprehensive agreement covering a large number of family problems is rarely effective. In this kind of case, which usually involves a history of conflict between the parent and child, a step-by-step approach works better. The emphasis in the first session is therefore on reestablishing communication between the parent and child and on reaching agreement on small specific items where a high probability of compliance can be expected. Subsequent sessions build upon the first, the contract is strengthened and broadened and additional problem areas are addressed.

At any time the family can get additional help in the form of mental health counseling, medical services, recreational and educational programs, or other supportive services. These services are offered either directly by The Children's Aid Society or through referral to outside agencies with which the project has developed relationships.

The Project's First Year

During the project's first twelve months of operation, a total of 233 cases were referred from the Manhattan and Bronx Family Courts. (This figure represents a little over 40% of the total number of PINS cases appearing at court intake in those boroughs.

128 of the families referred actually began mediation. Some of the others involved children who ran away. Some involved families in the kind of crisis where other kinds of services such as mental health counseling were deemed more appropriate. Others involved families who simply did not show up for scheduled appointments. Extensive follow-ups were done with these families, and they will be analyzed in the research study. We do know that only about 16% of these "drop-outs" have returned to court on new PINS petitions. In addition, once the collection of research data ended, and we were able to change staffing patterns to provide for a more extensive intake interview in court rather than by a social worker at the project prior to mediation, our drop-out rate was halved.

Of those who began mediation, 52 families successfully completed the process and 19 others were still involved. In sixty-six cases mediation was terminated prematurely, either because the family failed to show up for three or more consecutively scheduled appointments after mediation began or because problems were escalating and some more intensive kind of intervention was needed. Those families were offered other kinds of supportive services.

In looking at these statistics, it is important to remember that the PINS Mediation Project is targeted at the most difficult of the PINS population, those who have chosen not only to go to court but also to proceed on to petition without adjustment by Probation Intake. (Its conscious purpose in offering mediation at that stage, rather than more preventively, is to divert the large number of cases which would otherwise proceed on through the normal court process and to determine whether mediation can provide a workable alternative So far, less than 8% of the families who began mediation have returned to Court on new PINS petitions.

Follow-up data on all these families is still being collected. While we cannot therefore conclude any definite trends, we can say that of the first 20 one-month follow-up interviews conducted, fifteen of the families, including those who terminated prematurely as well as those who completed mediation, felt that mediation had been "helpful." Of the remaining five, one nevertheless stated that her daughter was more manageable, and two were cases where no agreement had been reached in mediation. Eleven of the twenty families interviewed reported that the original problems for which they had come to court had been resolved, and while the nine others reported that those problems had not been resolved, three of the nine said their children were more manageable and a fourth reported that mediation had been helpful.

The kinds of comments these families made in explaining why they thought mediation had been helpful are also interesting: "It helped in listening to each other"; "It brought us a little closer. We understand each other better"; "I see things in a new light"; and "____ has started to communicate."

It would appear, then, that there is a good fit between mediation and the needs of PINS families in general. In contrast to court, mediation helps parents and children to see the situation as a "family problem" and not simply as one involving the child. Far from intensifying parent/child isolation, mediation ameliorates it by facilitating communication between parent and child and by approaching the problem as one they can resolve together. Finally, the small, concrete successes the families experience in the form of specific written contracts which are kept from week to week and monitored by a neutral party, contribute to the feeling that family problems are under control and have a powerful positive effect on the sense of hopelessness these families experience.

Comparison between Court and Mediation Families

While the research comparing families choosing mediation with those who choose to pursue their PINS petition through the normal court process is by no means complete, some patterns are emerging. It appears that there is no significant difference between these families in terms of income, family composition, type of allegation, or the like. However, Hispanic females seem to be disproportionately represented among the court group. Interestingly, this corroborates a finding of the Vera Institute's 1981 Court dispositional study which goes on to state:

> "The high Spanish surname representation in this group (Juvenile in "away for sex" cases) was generally explained to us in terms of certain Hispanic cultural traditions that put greater value on protecting/sheltering women. We were told in interviews that Hispanic parents were more likely to become truly distraught and to look to the court for "paternal" coercive authority than were other groups. One I.O. said, "Hispanic mothers are used to calling on government to back up their authority. Apparently this is done commonly in Puerto Rico and placement can be easily arranged."**

Contrary to what one might expect, the research also appears to confirm that mediation families are more likely to have been involved with prior PINS proceedings than either the court families or the "drop-out" families (the "drop-out" families are the least likely to have been involved with a prior petition). This may suggest that those with prior court experience, while looking for help, have become disillusioned with what the court can actually do.

Conclusion

The research, when completed, will tell us a great deal more about which families mediation can work with, recidivism rates, and the like. It may be that combining mediation, either alone or in combination with other social services with provision for no-fault petitions for "alternative residential placement," could totally replace what we now call PINS jurisdiction.

In any event, it clearly appears that mediation can provide an effective and viable alternative to court for a good percentage of PINS families.

Footnotes

* The project pays mediators' transportation and a $10.00 stipend for each session.

** Vera Institute, Family Court Disposition Study (1981), p. 442-43.

P.i.n.s. Mediation

The Pins Mediation Program:

An Alternative to the Family Court

The Pins Mediation Program offers an alternative to the formal and adversarial family court system. It is designed to bring families together and allows each person to take part in finding workable solutions to problems.

WHO IS IT FOR?

Parents and youth charged with being "Persons In Need Of Supervision" (youth who have committed offenses which would not be criminal if committed by an adult).

PINS MEDIATION IS A BETTER WAY!

- Meetings take place at Children's Aid Society Community Centers
- A forum is refereed by a neutral third party trained in mediation techniques
- There is no need for a lawyer and no subsequent court record
- The program offers counseling and participation in the many Children's Aid supportive services for families including educational and recreational programs, medical and mental health clinics, vocational guidance and drug prevention

FOR FURTHER INFORMATION
CALL (212) 949-4929

A Program
of the
Children's Aid
Society

THE CHILDREN'S AID SOCIETY
105 East 22nd Street
New York, New York 10010

THE CHILDREN'S AID SOCIETY

CITY AND COUNTRY BRANCHES
[illegible]
[illegible]

Officers
[illegible]

Trustees
[illegible]

Honorary Trustees
[illegible]

Advisory Council
[illegible]

AGREEMENT TO APPEAR AT MEDIATION

Family Name ___________

I agree to participate in the PINS Mediation Project, sponsored by the Children's Aid Society, and will attend the Intake Interview on __________, at ______ a.m./p.m. , unless mitigating circumstances prevent me from doing so, in which case I will notify the social worker.

Signiture of Respondent	Date
Signiture of Petitioner	Date
Signiture of Witness	Date

PINS MEDIATION

Status Report (to Referral Sources)　　Date: ______

Case Name:

Date of Referral:

The family whose name appears above has participated in the following stages of the PINS Mediation Program:

☐ Intake Interview

☐ Mediation conference(s);
Number of sessions: ___

☐ Contract reached:

☐ Follow-up session with the mediator

Status of mediation: ☐ Completed ☐ In progress

Additional services offered, if any: ______

General comments: ______

Criminal Justice Coordinating Council
Research and Evaluation Division
111 John Street, 20th Floor
New York, New York 10038

CLIENT INTAKE INFORMATION FOR

PINS MEDIATION PROJECT

RESPONDENT:

Name ____________________ I.D. Number ____________

Street Address ____ Apt. # ____ City ____ State ____ Zip ____

Phone: ____________________

Most Accessible Center:
1) Dunlevy Milbank
2) Lower West Side
3) Rhinelander
4) Frederick Douglass
5) East Harlem

PETITIONER:

Name ____________________ Relationship to Respondent ____________

Street Address ____ Apt. # ____ City ____ State ____ Zip ____

Phone: ____________________

Most Accessible Center:
1) Dunlevy Milbank
2) Lower West Side
3) Rhinelander
4) Frederick Douglass
5) East Harlem

Contacts:
(Work, Friend, Relative, etc.)

Name ____________	Name ____________
Address ____________	Address ____________
Phone ____________	Phone ____________
Relationship ____________	Relationship ____________

Criminal Justice Coordinating Council
Research and Evaluation Division
111 John Street, 20th Floor
New York, New York 10038

CLIENT INTAKE INFORMATION FOR

PINS MEDIATION PROJECT

1. CLIENT I.D. NUMBER: ____________ (four digits) CLIENT'S NAME: ____________________

2. DATE OF INTAKE: ______ mo. ______ day ______ year

3. DATE CLIENT WAS REFERRED TO THE PROGRAM: ______ mo. ______ day ______ year

4. WHO REFERRED CLIENT TO THE PROGRAM?
   1 Legal Aid Attorney
   2 Corporation Counsel
   3 Family Court Judge
   4 Probation Supervision
   5 Other (specify): ____________

5. CASE ASSIGNED TO:
   1 Dunlevy Milbank
   2 Lower West Side
   3 Rhinelander
   4 Frederick Douglass
   5 East Harlem

6. RELATIONSHIP OF PETITIONER TO RESPONDENT:
   1 Both Parents
   2 Mother Only
   3 Father Only
   4 Other (specify): ____________

7. LEGAL STATUS OF PINS CASE AT INTAKE:
   1 Pre-Petition
   2 Petition Drawn
   3 Pre Fact-Finding
   4 Petition Withdrawn Without Prejudice
   5 Post Fact-Finding, Pre-Disposition
   6 Other (specify): ____________
   ____

8. ALLEGATIONS OF PETITIONER (Check all that apply):
   1 Truancy
   2 Absence from Home (specify): ____________
   3 Incorrigible (specify): ____________
   4 Drug/Alcohol Abuse
   5 Sexual Acting Out
   6 Violent Behavior
   7 Self-Destructive Behavior
   8 Uncooperative with Social Agency
   9 Other (specify): ____________
   ____

CLIENT CHARACTERISTICS

9. SEX:
   1 Male
   2 Female

10. ETHNIC BACKGROUND:
   1 Black
   2 Hispanic
   3 White
   4 Other (specify): ____________

11. DATE OF BIRTH: ______ mo. ______ day ______ year

12. AGE AT INTAKE: ____________

13. LIVING ARRANGEMENTS AT TIME OF INTAKE: Home (1)
   1 Alone
   2 One Parent
   3 Both Parents
   4 Foster Parent(s)
   5 Other Relative
   6 Friend
   7 Long-term childcare (CSS) or DFY facility (specify): ____________
   ____
   8 Other (specify): ____________
   ____

PINS MEDIATION PROJECT INTAKE - Page Two

School Status

14. HIGHEST SCHOOL GRADE COMPLETED AT INTAKE: ________

15. TERM COMPLETED THAT GRADE: ________

16. SCHOOL ATTENDANCE AT TIME OF INTAKE:
   1 Attending on a regular basis
   2 Attending on an irregular basis
   3 Not Attending--Reason: ________
   ____
   4 Not applicable; not enrolled in school
   8 Unknown

17. HAS CLIENT HAD SCHOOL BEHAVIOR PROBLEMS?
   1 Yes
   2 No
   8 Unknown

Prior Court History

18.	Yes	No	Number If Yes	No Info.
a) ARRESTED AS A JUVENILE?				
b) DELINQUENCY PETITION(S) DRAWN?				
c) PINS PETITION(S) DRAWN?				
d) CHARGED AS A JUVENILE OFFENDER?				
e) CHARGED AS A DESIGNATED FELON?				
f) ADJUDICATED A J.D.?				
g) ADJUDICATED A PINS?				
h) ADJUDICATED AS A JUVENILE OFFENDER?				
i) ADJUDICATED AS A DESIGNATED FELON?				
j) REMANDED TO SECURE DETENTION?				
k) REMANDED TO NON-SECURE DETENTION?				
l) PLACED IN RESIDENTIAL TREATMENT FACILITY?				

Prior Client History Of:

19. PSYCHIATRIC OR PSYCHOLOGICAL TREATMENT? Yes ____ No ____ Unknown ____
   If YES, specify: ________________
   ____

20. RUNNING AWAY? Yes ____ No ____ Unknown ____
   If YES, specify: ________________
   ____

21. NEGLECT OR ABUSE? Yes ____ No ____ Unknown ____
   If YES, specify: ________________
   ____

22. SERIOUS DRUG OR ALCOHOL ABUSE? Yes ____ No ____ Unknown ____
   If YES, specify: ________________
   ____

23. PRIOR PLACEMENT HISTORY (if any):

DATES From - To	FACILITY	COURT ORDERED /VOLUNTARY
-		
-		
-		
-		
-		

24. GENERAL COMMENTS ABOUT JUVENILE: ______

25. GENERAL COMMENTS ABOUT PETITIONER: ______

26. OUTCOME OF INTAKE INTERVIEW:

1. Case Accepted

2. Case Rejected--Reason: ______

27. INTERVIEW CONDUCTED: 1. In Person 2. By Phone

28. INTAKE WORKER: ______

DATE: ______

CODE NO.: ______

PINS Mediation
Children's Aid Society

COURT INTAKE QUESTIONNAIRE

Date: ______________

** 1. Child's Name: ______________________________

** 2. Address: ______________________________
____

** 3. Telephone: ______________________________

** 4. Parent/Guardian Name: ______________________________

** 5. Relationship: ______________________________

** 6. Address ______________________________
____

** 7. Telephone: (H) ______________ (W) ______________

** 8. Petitioner (if not parent/guardian) ______________________________

** 9. Date of Birth: Child: ____ mo. ____ day ____ year Parent: ____ mo. ____ day ____ year

** 10. Prior Court History: ______________________________
____
____
____
____

** 11. Current Allegations: ______________________________
____

12. Onset of Behavior: ______________________________
____

13. Juvenile's View: ______________________________
____
____

14. In the past year, have you used any of the following resources for help in dealing with ________________ problem?

		USED		
		HELPFUL	NOT HELPFUL	NEVER USED
**	(a) Social worker.................			
**	(b) Psychiatrist			
	(c) Doctor, nurse			
	(d) Lawyer			
	(e) Priest, Minister, Rabbi			
	(f) Clinic			
	(g) Friends			
	(h) Relatives			
	(i) Planned Parenthood			
	(j) Other (Specify)			
	________________			
	________________			

Specifications: ________________

** 15. Runaway History: ________________

** 16. Drinking and Drugs: ________________

17. Hospitalization (relatives, also): ________________

18. Jail: ____________________

____

19. Parent's Work History: ____________________

____

____

20. Income: $____________________

** 21. Who is in Household? ____________________

____

Overcrowded? ____________

22. Marital History: ____________________

____

____

** 23. Placement History: ____________________

____

24. Activities: Together ____________________

____

Child: ____________________

____

Parent: ____________________

____

25. Fighting: Verbal ____ Physicial ____

26. Deaths in Family: ____________________

____

____

27. School History: ____________________

____

** 28. Highest Grade Completed: ________ Year: ________

** 29. Attendance: Regular: ________ Irregular: ________

Not attending: ________ Reason: ________

** 30. School Bevhavior Problems: No: ______ Yes ________

31. Comments: ________

32. Mediator Assigned: ________________ Date of First Mediation: ______

Mediator Questionnaire

Date: ____________________

Case Name: ______________________________

Assigned Mediator: ____________________

Time Mediation Began: __________________ Time Ended: ____________________

Mediation Session # __________

Name of Center: ____________________

Relationship of Petitioner to Juvenile: ______________________________

Others Present During Mediation: ______________________________

Language Mediation is Conducted in: ______________________________

1. Were both the disputing parties present at the session?

   1._____Yes

   2._____No (Specify who did not show and why) ____________________

   ____

2. Was an agreement reached and contract drawn?

   1._____Yes (Attach contract to this form)

   2._____No

   3._____Agreement Reached in Previous Session

   a) IF NO---What was the extent of movement toward reaching an agreement?

   1._____Much 2._____Some 3._____None

   b) IF PREVIOUS AGREEMENT---Have both parties been adhering to the agreement?

   1._____Yes

   2._____No (Specify who broke agreement and why) ____________________

   ____

   ____

   ____

3. What facts led to agreement? ______________________________

   ____

   ____

4. What facts do you feel are missing? ______________________________

5. How can you get them? ______________________________

6. What were the difficult blocks to resolution, e.g. was child reluctant to talk? ______________________________

7. What did you do? ______________________________

8. What indications do you have that agreement will work? ______________________________

9. Describe critical points or important points of session: ______________________________

Additional session

Date: ______________________________

Time: ______________________________

Location: ______________________________

NOTE: If you feel mediation should be terminated, make note of reason and consult with me before taking action.

THE CHILDREN'S AID SOCIETY

[illegible] MEDIATION

[illegible]

Case Number:____________

WHEREAS, THE PARTIES HERETO HAVING HAD FULL AND FAIR HEARING ON THE ISSUES, BE IT RESOLVED THAT THE PARTIES HAVE AGREED TO THE FOLLOWING:

1. I, , agree to attend school everyday - as soon as I am enrolled by my mother.
2. I, L , agree to register in school and I will telephone Mr. for help with this, if I need it.
3. I, Mr. , will help L with the above, if she requests my help.
4. I, , will move back home with my mother tomorrow.
5. I, L , agree to sitting down and talking with and will try to cut down on screaming.
6. I Mr. , agree to have all the children over at least one week-end a month.
7. I, , agree to throw out the garbage, bottles and newspapers as usual, clean my room and come home at 10:00 weekdays and 11:30 weekends.
8. I, L , agree not to stay out overnight or thru week-ends when the children are at home with me.
9. If any part of the agreement cannot be adhered to by anyone we all agree not to fight about it at home and yell and scream but to bring back to mediation all our complaints.

____
Petitioner

____
Respondent

____
Mediator

State of:

County of:

On this 30th day of Nov., 1981, before me, the subscriber, personally appeared____________________ to me personally known and known to me to be the same persons described in and who executed the within instrument and they severally duly acknowledged to me that they executed the same.
Sworn to me this__________day of__________, 1981.

[illegible]

Sample
CONSENT AGREEMENT
(actual case)

Case Number: 212

WHEREAS, THE PARTIES HERETO HAVING HAD FULL AND FAIR HEARING ON THE ISSUES, IS IT RESOLVED THAT THE PARTIES HAVE AGREED TO THE FOLLOWING:

① . AGREES TO ATTEND SUMMER SCHOOL EVERYDAY.

② N AGREES TO DO HOUSECHORES EVERYDAY ←

③ N AGREES TO FOLLOW 6PM CURFEW MONDAY - THURSDAY AND 11:30PM FRIDAY AND SATURDAY AND 1:30AM WHEN AT A PARTY WHICH WILL NOT BE MORE THAN TWICE PER MONTH.

④ B AGREES TO ATTEND SUMMER SCHOOL EVERYDAY

⑤ B AGREES TO DO HOUSECHORES EVERYDAY.

⑥ B AGREES TO FOLLOW 6PM CURFEW MONDAY - THURSDAY AND 11:30 PM FRIDAY & SATURDAY AND 1:30 AM WHEN AT PARTY WHICH WILL NOT BE MORE THAN TWICE PER MONTH

⑦ MRS. AGREES TO PROVIDE $50 EVERY 2 WEEKS.

⑧ MRS. AGREES TO TRY TO STOP SCREAMING WHEN SHE GETS ANGRY

⑨ MR. AGREES TO INVESTIGATE POSSIBILITY OF ENROLLING BRENDA IN MT. ST. MICHAEL HIGH SCHOOL FOR SEPT.

⑩ N AGREES TO INFORM MOTHER OF WHEREABOUTS.

⑪ B. . . AGREES TO INFORM MOTHER OF WHEREABOUTS

PETITIONER RESPONDENT

MEDIATOR

State of: NEW YORK

County of: BRONX

On this 30TH day of JUNE, 1981, before me, the subscriber, personally appeared ________ to me personally known and known to me to be the same persons described in and who executed the within instrument and they severally duly acknowledged to me that they executed the same.
Sworn to me this ________ day of ________, 1981.

THE CHILDREN'S AID SOCIETY

FAMILY MEDIATION

sample
CONSENT AGREEMENT
(actual case)

Case Number:__________

WHEREAS, THE PARTIES HEREIN HAVING HAD FULL AND FAIR HEARING OF THE ISSUES, BE IT RESOLVED THAT THE PARTIES HAVE AGREED TO THE FOLLOWING:

△ agrees To
(1) Take out the family's dog Twice a day
(2) To clean the cat's litter box every morning
(3) when he is out on the weekends. to check with his brother by phone between 6-7 pm to [illegible] where his whereabout

△ and Mother both agrees that △ will Take Turns washing the dish with his sister Anna and Mother will wash the pots..

(mother) agrees that on the week days △ may go out at 8pm, if he has completed his homework, but should return home no later than 10pm
(4) On weekends, Friday and Saturday, △ may be out no later than 12 midnight unless there is special circumstances [illegible] a late movie. or a party

PETITIONER:__________

RESPONDENT__________

MEDIATOR

State of: New York Notary #-4759467
County of: New York William D. [illegible]
On this 15th day of December, 1981, before me, the subscriber personally appeared__________ to me personally known and known to me to be the same persons described in and who executed the within instrument and they severally duly acknowledged to me that they executed the same.
Sworn to me this fifteenth day of December, 1981.

MEDIATION SESSIONS HELD

SOCIAL WORKER: ____________________

CASE NAME:	MEDIATION SESSION #	DATE	ATTENDED:			CANCELLED:	NO SHOW:		DATE RESCHED.	TERMIN.	COMPL. MED'TN.	SERVICE REFERRAL
			BOTH/	PET/	CHLD		S.W. PHONED	MAILGRM. SENT				

never log

									[illegible]				[illegible]		
[illegible]	[illegible]	[illegible]	[illegible]	First [illegible]	Second [illegible]	Third [illegible]	Fourth [illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

PINS Mediation Project
Children's Aid Society
105 East 22nd Street
New York, New York 10010

I.D.# ____________________

END OF MEDIATION FORM

1. JUVENILE'S NAME: ____________________

2. TOTAL NUMBER MEDIATION SESSIONS ATTENDED: ____________________

3. DATE OF FINAL MEDIATION SESSION ATTENDED: ____________________

4. MEDIATION OUTCOME:

1. ______MEDIATION COMPLETED, NO FURTHER REFERRAL TO COURT, AGENCY:

Describe Agreement Reached. ____________________

2. ______MEDIATION COMPLETED, REFERRED TO COUNSELING:

0. ____Family and/or Juvenile to be scheduled for counseling at CAS
1. ____Family and Juvenile continuing at CAS
2. ____Juvenile Only continuing at CAS
3. ____Family continuing at CAS, excluding juvenile
4. ____Juvenile Only referred to Other Agency
5. ____Family referred to Other Agency, excluding juvenile
6. ____Other (Specify) ____________________

MEDIATION OUTCOME CONTINUED:

3.______CASE REFERRED BACK TO COURT

______CASE NOT REFERRED BACK TO COURT

1.____Unsatisfactory progress in mediation: (Specify)

____

____

____

____

2.____Non-participation in mediation on the part of:

1.____Juvenile Only

2.____Petitioner Only

3.____Both Juvenile and Petitioner

4.____Due to Other Causes: (Specify)__________

____

____

IF REFERRED BACK TO COURT COMPLETE PARTS A and B BELOW

A. COURT ACTION TAKEN:

1.____Adjusted at Intake

2.____Petition Drawn

3.____No Action

4.____Unknown

5.____Other (Specify)

____

B. LEGAL STATUS OF JUVENILE AT PRESENT:

1.____Awaiting Adjudication

2.____Awaiting Sentencing

3.____Institutionalized

4.____On Probation

5.____On Parole

6.____Other (Specify)

____

7.____Unknown

5. SCHOOL ATTENDANCE AT TERMINATION:

1.____Attending on a Regular Basis
2.____Attending on an Irregular Basis
3.____Not Attending - Reason:______________________________
____

6. IS JUVENILE HAVING SCHOOL BEHAVIOR PROBLEMS CURRENTLY?

1.____Yes 2.____No 3.____Unknown

7. CURRENT CRIMINAL JUSTICE INVOLVEMENT SINCE INITIAL REFERRAL:

	1 YES	2 NO	3 UNKNOWN
a. Was the Juvenile arrested?	____	____	____
b. Was a Delinquency Petition Drawn?	____	____	____
c. Was a PINS Petition Drawn?	____	____	____
d. Was Juvenile charged as Juvenile Offender/Designated Felony?	____	____	____
e. Was Juvenile adjudicated a J.D.?	____	____	____
f. Was Juvenile adjudicated a PINS?	____	____	____
g. Was Juvenile convicted as Juvenile Offender/Designated Felony?	____	____	____
h. Was Juvenile remanded to a secure detention facility?	____	____	____
i. Was Juvenile placed in residential treatment facility?	____	____	____

8. PRESENTING PROBLEM:

	1 RESOLVED	2 NOT RESOLVED
a. Truancy	____	____
b. Runaway	____	____
c. Stays out late	____	____
d. Incorrigible at home	____	____
e. Unmanageable at school	____	____
f. Alcohol abuse	____	____
g. Drug abuse	____	____
h. Sexual acting out	____	____
i. Violent behavior	____	____
j. Self-destructive behavior	____	____
k. Uncooperative with Social Agency	____	____
l. Other (Specify)______________		
________________________	____	____

9. WHAT SERVICES HAVE BEEN UTILIZED TO DATE, IN ADDITION TO MEDIATION?

00.____None
01.____Health Services
02.____Personal Counseling
03.____Drug Counseling
04.____Alcohol Counseling
05.____Sexuality Group
06.____Educational Counseling
07.____Vocational Counseling
08.____Tutoring
09.____Recreation
10.____Psychiatric Testing
11.____Educational Testing
12.____Other (Specify)__________
____

COMMENTS: ____________________

SOCIAL WORKER: ____________________ DATE: ____________

PINS MEDIATION
SOCIAL SERVICES CONTROL SHEET

Juvenile's Name: ______________________ Date Referred: __________

Petitioner's Name: ______________________ Date Seen: __________

Mediation Outcome:

☐ No Mediation. Reason: ______________________

☐ Completed. Date of last Session: ______________________

☐ Postponed. Reason: ______________________

☐ Premature Termination ☐ Unsatisfactory Progress ☐ Failure of Parties to attend

Services Requested: ______________________

Services Provided (type and date)

Reinvolvement with Criminal or Juvenile Justice System (date, nature and disposition of involvement)

Termination Date: __________ Reason: ______________________

Social Worker Assessment: ______________________________

PINS Mediation Project
Children's Aid Society
105 East 22nd Street
New York, New York 10010

DROP-OUT QUESTIONNAIRE

CHILD'S NAME	DATE OF BIRTH
PETITIONER'S NAME	RELATIONSHIP TO CHILD
ADDRESS	PHONE
INTERVIEWER	DATE

1. a)Who originally described the program to you?

   b)And at what stage of the court process?

2. Did you have any contact with a staff member of the PINS Mediation Project?

3. What made you initially agree to participate in mediation?

4. a)What happened that you changed your mind about participating?

   b)Did you have difficulty in attending the intake and if so, what made it difficult?

5. Are you still having problems with______________, or have things settled down? (Specify)____

____

____

____

6. If you are still having problems, what are you doing about it now?

____

____

____

____

7. Have you returned or do you plan to return to court?______________

8. Do you want______________placed out of your home at this time?______

9. Is there anything further we can do to help your situation?_________

____

____

____

____

10. Would you mind if I call you in about 3 months to see how you are doing?____________________________

PINS Mediation Project
Children's Aid Society
105 East 22nd Street
New York, New York 10010

I.D.#________________

FOLLOW-UP QUESTIONNAIRE

Child's Name____________________ Petitioner's Name____________________

Interviewer's Name____________________ Date____________________

1. Since mediation ended have you changed:

	NO	YES	IF YES-SPECIFY CHANGE
a. your address or phone?	___	___	____________________
b. your household composition?	___	___	____________________
c. your marital status?	___	___	____________________
d. jobs or just started to work?	___	___	____________________

2. Is______________living with you?

   1.___Yes
   2.___No (SPECIFY WITH WHOM CHILD LIVES)____________________.

IF CHILD NOT IN HOME ASK:

a. Would you say you've felt better or worse since____________has been out of your home?

   1.___Better
   2.___Worse
   3.___About the same

3. Are both you and ________________still adhering to the written agreement?

   1.___Yes, Both Petitioner and Child
   2.___No, Only Petitioner adhering
   3.___No, Only Child adhering
   4.___Neither Petitioner or child adhering

4. Have you been back to court on behalf of ____________ since mediation ended? (CHECK ALL THAT APPLY)

0___No subsequent court appearance
1___Yes, PINS (SPECIFY ALLEGATIONS AND DATE RETURNED TO COURT)

____

____

2___Yes, Delinquent (SPECIFY ALLEGATIONS AND DATE RETURNED TO COURT)

____

____

5. If you think back to how strict you were before mediation and compare it to now, do you feel that you are now:

1___More strict
2___Less strict
3___About the same, neither more nor less strict

IF MORE OR LESS STRICT ASK: WHY? ______________________________

____

____

____

____

6. Since mediation, do you feel that you are more consistent in following through when you tell ____________ you will punish him/her if he doesn't behave?

1___More consistent
2___Less consistent
3___About the same

7. How would you compare the difficulty in handling____________now as compared to before you went through mediation? Is she/he:

1___More manageable
2___Less manageable
3___About the same

IF MORE MANAGEABLE ASK: What do you attribute this to?_______________

____

____

____

____

____

____

8. Ms/Mr.______________looking back on the original problem(s) that brought you to take out a petition, what do you think caused the trouble in the beginning? (PROBE)

01___Child is to blame
02___Parent/Guardian is to blame
03___Parent/Guardian handled him/her badly
04___Death in the family
05___Not able to spend enough time with child
06___Don't communicate well
07___Child's friends are to blame
08___Alcohol/Drug abuse of Parent/Guardian
09___Alcohol/Drug abuse of Child
10___General family pressures
11___Financial problems
12___School fault
13___Neighborhood
14___Other (Specify)______________________
15___Don't know

9. Ms/Mr.____________do you feel that the original problem(s) for which you sought help have been resolved or not?

1___Yes, resolved
2___No, not resolved

IF NO ASK: What do you think the best solution now would be? (CHECK ONLY ONE RESPONSE)

1___Move from neighborhood
2___School transfer
3___Remove child from home
4___Spend more time with child
5___Counseling for child
6___Counseling for mother/guardian
7___Nothing will work, it's hopeless
8___Other (Specify)______________________________

IF REFERRED FOR SERVICES AT END OF MEDIATION ASK:

10. Were you referred for counseling or other social services at the end of Mediation/Court Contact

1___Yes(Specify service)______________________________
2___No

IF YES ASK:

Have you been attending or not?

0___Family and/or Juvenile was not accepted
1___Family and Juvenile currently attending at CAS
2___Juvenile only attending at CAS
3___Family attending at CAS, excluding Juvenile
4___Family and Juvenile attending at other agency
5___Juvenile only attending at other agency
6___Family attending at other agency, excluding Juvenile
7___Juvenile and/or family attended for a time but not attending now
8___Other (Specify)______________________________

11. Are there any services which you would like to be referred for now:

01___No, none needed
02___Health services
03___Personal counseling
04___Drug counseling
05___Alcohol counseling
06___Sexuality group
07___Educational counseling
08___Vocational counseling
09___Tutoring
10___Recreation
11___Psychiatric Testing
12___Educational Testing
13___Other (Specify)______________________________

12. Now, just to sum things up, looking back on your mediation experience do you feel that mediation was helpful or not in dealing with the problem(s)?

1___Helpful
2___Not helpful

a. IF HELPFUL ASK: What are you or___________doing differently now than before mediation?_______________

b. IF NOT HELPFUL ASK: Why do you think mediation didn't help?________

IF JUVENILE AVAILABLE ASK: Questions 13-17

13. Since mediation how would you describe the relationship between you and your mother/guardian? Would you say that you are:

1___Very close
2___Somewhat close
3___About so-so
4___Not very close
5___Not close at all

14. In the past month do you feel that you and your mother/guardian spent enough time together, or would you have liked to have more time with her/him?

1___Yes, wants more time
2___No, spent enough time

15. Looking back over the past month have you been:

	NO	YES	IF YES-SPECIFY
a. Truant	___	___	___
b. Running away	___	___	___
c. Staying out late	___	___	___
d. Disobedient at home	___	___	___
e. Having school behavior problem(s)	___	___	___
f. Drinking alcohol	___	___	___
g. Using drugs	___	___	___

16. Are you attending school regularly or not?

1___Attending on a regular basis
2___Attending irregularly
3___Not attending at all (Specify why) ____________________

____

17. Do you feel that mediation was helpful or not?

1___Helpful
2___Not Helpful

a. IF HELPFUL ASK: What are you or your mother/guardian doing differently now than before mediation?

____

____

____

____

____

b. IF NOT HELPFUL ASK: 1. Why do you think mediation didn't help?

2. What do you think the best solution now would be?
(CHECK ONLY ONE RESPONSE)

1___Move from neighborhood
2___School transfer
3___Remove child from home
4___Spend more time with child
5___Counseling for child
6___Counseling for mother/guardian
7___Nothing will work, it's hopeless
8___Other (Specify)______________________

Interviewer's Comments:______________________

The Children's Aid Society

gratefully acknowledges

____

for participation in
and successful completion of
the PINS Mediation Trainining Program

____

____
Director

THE CONFLICT RESOLUTION AND MEDIATION PROGRAM:
An Alternative to Violence

Barbara Brodsky
Coordinator of Mediation, Middle Country School District
Senior Mediator, Community Mediation Center

In an effort to help youngsters recognize when their frustrations are leading to verbal or physical abuse, and/or violence, the Middle Country School District (15,000 students) has implemented a Conflict Resolution and Mediation Program. The program has been funded under Title IVC to address such problems as prejudice, indifference and lack of communication in the home environment and school community. Experience establishes that antisocial behavior in the home or neighborhood eventually spills over into the school community and can disrupt the educational process. By making the community aware of this new service, the district hopes to decrease bus stop incidents, vandalism, lunchroom or locker room confrontations, destruction of personal property, absenteeism, and conflicts between parent and child. The goal of the Conflict Resolution and Mediation Program is to educate youngsters to the benefits of discussing their problems rather than resorting to violence, or running away from home. Since involvement in mediation is always voluntary, the students demonstrate that they are taking the first step toward solving their own problems by agreeing to attend a session.

Mediation takes place when a neutral third party, trained in conflict resolution and acting as a facilitator helps disputants to mutually agree to their own solution to a problem. A parent must accompany a minor student to a mediation session.

Rather than educating youngsters to take responsibility for their own actions, we have traditionally forced them to accept a punishment imposed by an authority figure.

In this age of alternatives, the Conflict Resolution and Mediation Program can be used as another medium to calm the hostility and violence we see surfacing in an alarming number of incidents. We are teaching students how to effectively deal with hostile and violent emotions before they reach the confrontation stage. Employing the mediation program has become a principal's alternative prior to suspension. The principal of each school has the option to refer cases for mediation when he/she feels the case is appropriate and both sides agree to participate. In negotiable cases, the principal will call or send a memo to the Coordinator of Mediation with the disputants' names and telephone numbers, and a brief sketch of what has previously transpired. The Coordinator will contact each side to arrange a date, time and place for mediation. Many times a session will be scheduled for evening mediation, since parents are usually employed during the daytime. Two mediators are scheduled for each case. After an agreement has been reached, the parents, students and mediators sign a formal contract containing the elements of the agreement. Each disputant leaves the session with a copy of the contract. The Coordinator is present at each mediation session to consult with the mediators and to carefully check the agreement for it's legality. The building principal will receive a copy of the agreement the next day. If the agreement is broken, the case will return to the principal.

The Conflict Resolution and Mediation Program is not designed to undermine the authority of the administrator or teacher. It is an alternative method of dealing with frustrations when conventional methods have not produced desired results. A teacher may be the first person to suspect that a student's problem requires the use of mediation, and without divulging any confidentiality, can refer the case for mediation through the principal.

Ernie Odom, Executive Director of the Community Mediation Center, has been hired as a consultant to the mediation program by the Middle Country School District. For the past five years Mr. Odom's agency has been successfully mediating cases referred from the Suffolk County District Attorney's Office.

After being carefully interviewed by the Coordinator of Mediation and Mr. Odom to measure their openness, sensitivity, composure and fair mindedness, 70 volunteers were trained as mediators for the Conflict Resolution and Mediation Program in four different cycles. Each cycle consisted of four six-hour days from 9 a.m. to 3 p.m. Teachers, students and parents had an opportunity to work cooperatively to learn the techniques of conflict resolution. Some of the skills emphasized in training were: Principles and techniques of conflict management, objectivity, neutrality, perceptivity, confidentiality, interviewing techniques,

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skills of bargaining and awareness of one's impact on others. A manual, lectures, roleplaying, video taping and question and answer periods were used to emphasize the skills needed to become a mediator. Money was incorporated into the grant to pay for substitute teachers, while faculty members took advantage of the training. A mediator's certificate was presented to each participant who completed the twenty-four hour course. This year, a one day refresher course was given which dealt with more advanced mediation practices.

Principals, mediators and disputants are periodically interviewed for feedback and follow-up material by Dr. Joseph Palenski, the evaluator of the program. Dr. Palenski has designed an evaluation instrument for mediators as well as disputants and reviews the case histories and records of the program. His follow-up has indicated that every agreement mediated, thus far, has successfully resolved the dispute that was being negotiated. Approximately 95% of the agreements have remained intact.

A significant amount of the Coordinator's time is spent on community education, as well as in the classroom roleplaying interpersonal disputes with many of the students in the school district. The understanding of violent emotions and how they affect our daily lives has lead us to take a further step in dealing with alternatives to violence. The Coordinator has met with the Social Studies Department of one of the Junior High Schools to discuss inserting conflict management into the seventh and eighth grade curriculum. The staff has been most receptive and are now in the process of pooling ideas and discussing future possibilities. Since the Conflict Resolution and Mediation Program has been so successful, and Title IVC funds will no longer be available next year, we are investigating other sources of funding. BOCES and the possibility of shared multidistrict participation is high on the list of alternatives.

For further information contact:

Barbara Brodsky
Dr. Richard Shaughnessy
Coordinators
Middle Country School District
8 43 Street
Centereach, New York 11720
(516) 588-8426 or 8443

CONFLICT RESOLUTION AND MEDIATION PROGRAM

BUDGET

		*MCSD Plus two dist.	*MCSD Plus one dist.	1 New dist.
Coordinator		$ 15,300.	15,300.	7,650. (half day)
Travel	(Workshops and dist. to dist)	1,000.	750.	500.
Community Mediation Center	(Consultation and training)	8,000.	5,000.	4,000.
Substitute teachers 10 each dist.	(Training-4 days $ 35. a day)	4,200.	2,800.	1,400.
Substitute teachers 2 each dist.	(Mediating-10 days $ 35. a day)	2,100.	1,400.	700.
Clerical		7,200.	7,200.	3,600. (half day)
Publications	(Brochures and posters)	800/	600.	300.
Evaluator		3,000.	3,000.	not required
Office Supplies		600.	400.	200.
Shared services between three districts would total		$ 42,280.	36,450.	** 18,350.
Reduction of the balance would be determined by aidable percentages for each district. Example: Middle Country's aidable percentage is 70% of:		14,093.	10,225.	
Therefore, Middle Country's *actual* cost would be:		4,228.	3,068.	

*Middle Country School District (Suffolk County)

** Not a shared service, no BOCES funding

Sample of case histories:

I. The complainant was a Junior High School student who stated that five white Junior High School students were responsible for racial harassment in their school, neighborhood and at the bus stop. The respondents stated that there was verbal and physical harassment, but not meant to be racial. The ruspondents further stated that the harassment stemmed from repeated incidents in which the complainant was the instigator.

After mediation, this case was formally resolved with a written agreement.

Agreement: All parties agree:to respect each other's rights and avoid contact, not to listen to third party accusations and inflammatory statements, and not to use names which have emotional and/or racial overtones.

II. This case was sent to the Conflict Resolution and Mediation Program two days before the end of the school year in June. The complainant was a parent who's child was intelligent, but failing most of her subjects in High School. The Guidence Counselor was trying to arrange counselling for the family at the start of the school year in September. The parents took all social privileges away from the student, stating that she had to remain in her room, alone, during the entire summer vacation. The respondent was the student. She had her belongings packed and was preparing to run away from home at her first opportunity.

After mediation, this case was formally resolved with a written agreement.

Agreement: The respondent agrees not to run away. The complainant will allow the student to leave their home every other day to socialize with friends, but she must return home by 5 p.m. On alternate days when she is at home, the student is allowed to entertain her friends at home, providing that her chores for the day are completed, and the friends leave by 5 pm.

III. The complainant was involved with the respondents in a fist fight in the lunchroom of the High School. There was a history of neighborhood and school disputes. The complainant and the two brothers who were the respondents, represented different groups in the neighborhood and school community. They were choosing up sides for a larger confrontation.

After mediation, this case was formally resolved with a written agreement.

Agreement: The complainant and respondents agreed to have no further confrontations and agreed to avoid each other and encourage their friends to follow suit.

IV. There was repeated physical and verbal abuse between the complainants and respondents at their elementary school bus stop over a period of two years. The disputants had been spoken to on many occasions, but denied culpability.

After mediation, this case was formally resolved with a written agreement.

Agreement: It was agreed that verbal and physical harassment was socially unacceptable behavior and all parties agreed not to take part in such behavior and to encourage their friends to follow their example.

V. The complainants were parents who were having difficulty getting their son to attend school on a regular basis. A school administrator, acting as a representative of the principal, was a fellow complainant in this case. The student's antisocial behavior, truancy and lack of academic interest were some of the complaints. The respondent was a High School student who felt that his high I.Q. entitled him to be removed from the lowest tracked classes he was presently enrolled in. He also wanted to be able to take part in a computer course that had been denied because of his current track.

After mediation, this case was formally resolved with a written agreement.

Agreement: The Administrator agreed to give the student a chance at the computer course provided the student would agree to: get to school on time, attend all classes in his program, come prepared with the required materials, avoid confrontations with staff, and behave appropriately in a classroom situation. The parents agreed to now allow the school to perform psychological testing on the respondent and if necessary hire a tutor to bring him up to date in all of his classes.

VI. The complainant was a security guard working in the High School He was anxious to resolve an escalating dispute with a student that had been going on for two years. The respondent, a High School student felt that the security guard was going beyond his duty in correcting behavior. The security guard was South American and believed that spitting on the ground was the worst insult to another human being. During the last dispute, the respondent pulled his pants down and said, "kiss my butt" to the security guard. The respondent claimed that the complainant threatened him with his car while the respondent was on foot.

After mediation, this case was formally resolved with a written agreement.

Agreement: The complainant agreed to approach the respondent in a civil manner. In return, the respondent agreed that if approached by the complainant, he would respond in a civil manner. If the student does not respond properly to the guard's directions, the guard will report the situation to the proper authorities.

VII. The complainant and respondent were High School girls who were constantly physically and verbally harassing each other at the bus stop, in school and in the neighborhood, for the last few years. The police have been called by both sides on numerous occassions. During the last altercation, the complainant's glasses were taken. The complainant and respondent's mothers had difficulty in communicating without abusing each other.

After mediation, this case was formally resolved with a written agreement.

Agreement: All parties agreed not to harass each other in school, neighborhood and on the school bus. All parties agreed to instruct their friends not to get involved in their personal problems. Both mothers agreed that they will no longer communicate with eachother. Both fathers agreed that if a problem arises they will contact eachother to discuss and resolve the problem.

VIII. The complainant is the legal guardian of her sister. The respondent is an 18 year old High School student who had been living with her sister and brother in-law for three years. Three weeks ago, the respondent left home to live with a series of girlfriends, because she felt deprived of social privileges. The respondent wanted to be allowed to go out on school nights.

After mediation, this case was formally resolved with a written agreement.

Agreement: The respondent agreed to move back into her sister's home. The complainant agreed that if all school work was completed, the respondent would be allowed to go out on school nights every other night until 9 p.m.

IX. The complainant and respondent are two High School students who were suspended in September for fighting in school. The physical abuse has continued. During the last altercation, the complainant's girlfriend was punched in the face and his girlfriend and sister were sexually threatened.

After mediation, this case was formally resolved with a written agreement.

Agreement: All parties agreed to refrain from any physical or verbal abuse toward one another. All parties agree that they will communicate to their friends that the situation has been resolved and ask them to refrain from any verbal or physical abuse toward each other. The parents of the disputants agree to open a line of communication concerning the well-being of their children.

The principals who have referrred these cases for mediation have received copies of each agreement. A follow-up has indicated that every agreement has successfully resolved the dispute.

SAMPLES OF IMPLEMENTATION OF THE CONFLICT RESOLUTION AND MEDIATION PROGRAM IN THE MIDDLE COUNTRY SCHOOL DISTRICT

DISPUTE	BEHAVIOR	COMPLAINANT	RESPONDENT	DISPOSITION
Racial	Harassment in school and bus stop	Student	Students	Formally resolved written agreement
Violent behavior	In-school recruitment of gang members	Students	Students	Formally resolved written agreement
Intra-family	Low grades in school vs. curtailment of student's freedoms to go out, threats to run away	Parent	Student	Formally resolved written agreement
Intra-family	Truancy, low grades	Parent	Student	Not mediated, family moved out of district
Bus stop	Harassment in school and neighborhood	Students	Students	Formally resolved written agreement
Intra-family	Truancy	Parent	Student	Formally resolved written agreement
Intra-family	Parents felt need for counselling, student did not	Parent	Student	Not mediated, student refused to be present
Bus stop	Physcial and verbal harassment at bus stop	Students	Students	Formally resolved written agreement
Intra-family	Student ran away for three weeks due to no freedom to go out on school nights	Student	Foster Parent	Formally resolved written agreement
Anti-social behavior	Mooning student in school	Security guard	Student	Formally resolved written agreement
Anti-social behavior	Threats and Harassment in school	Student	Students	Complainant failed to to appear, not mediate
Intra-family	Student wanted more freedom to go out	Student	Foster Parent	Not mediated, student on probation-dealt with problem through probation officer
Anti-social behavior	Physical violence in school	Student	Student	Formally resolved written agreement

CONFLICT RESOLUTION AND MEDIATION PROGRAM
REFERRAL SHEET

Mediation Case #__________
Date __________

COMPLAINANT: NAME ____________________
ADDRESS ________________ BUSINESS: Father __________
Mother __________
TOWN________________
PHONE__________ Home/Business __________

RESPONDENT: NAME____________________
ADDRESS________________ BUSINESS: Father __________
Mother __________
TOWN ________________
PHONE __________ Home/Business __________

NATURE OF COMPLAINT: ____________________
REFERRED BY: __________ SCHOOL __________
INCIDENT SUMMARY: ____________________

CONFLICT RESOLUTION AND MEDIATION PROGRAM
MIDDLE COUNTRY CENTRAL SCHOOL DISTRICT
8-43rd St., Centereach, New York 11720
Telephone: (516) 737-4127 or 737-4130
Ms. Barbara Brodsky
District Coordinator for Mediation

MEDIATION CONSENT FORM

I,________________________________, the undersigned do understand that mediation is a voluntary process to which I consent. I understand that only I can reach a resolution, that the mediators cannot force one upon me.

I understand and agree that everything said in the Mediation Program of a personal nature is privileged and confidential. However, anything proven to be against the law will have to be reported.

I also agree not to subpoena or otherwise involve the staff, mediators, or records of the Conflict Resolution and Mediation Program in any court proceedings or lawsuits whatsoever.

Signed:________________________________

Date:________________________________

IMPORTANT

PLEASE INFORM THE STAFF OF THE MEDIATION CENTER IF YOU HAVE ANY OTHER COMPLAINTS PERTAINING TO THIS SITUATION.

CONFLICT RESOLUTION AND MEDIATION PROGRAM
MIDDLE COUNTRY SCHOOL DISTRICT # II
8-43rd Street, Centereach, New York 11720.
Telephone (516) 737 - 4127 or 737 - 4130

Ms. Barbara Brodsky
District Coordinator for Mediation

IN THE MATTER OF MEDIATION BETWEEN:

Complainant:

Respondent:

AGREEMENT

The parties agree that in the event they have future difficulties with this agreement, or with one another, they will contact the Conflict Resolution and Mediation Program Center before filing any further complaints.

WE, the undersigned, having participated in a mediation session on ______________________________, and being satisfied that the provisions of the resolution of our dispute are fair and reasonable, hereby agree to abide by, and fulfil the following:-

1.

Conflict Resolution and Mediation Program
Middle Country School District
9-43rd St., Centereach, New York 11720
Telephone: (516) 737-4177 or 737-4130
Ms. Barbara Brodsky
District Coordinator for Mediation

Re:

Dear ______________________________:

The above mentioned case has been mediated and resolved and the parties have signed a written agreement.

Very truly yours,

Ms. Barbara Brodsky
District Coordinator

CASE NO. _______________ (FOR OFFICE USE ONLY) DATE _______________

1. In this case were you the

a. _____ Complaining party
b. _____ Responding party

2. To what extent did you think the outcome was fair or equal?

a. _____ Very much
b. _____ Somewhat
c. _____ Less than somewhat
d. _____ Not at all

4. What did you hope would be accomplished in this session? (Check the most appropriate)

a. _____ End to problem behavior (imed.)
b. _____ Improvement of problem behavior
c. _____ Punishment in response to behavior
d. _____ Acknowledgement by parent or teacher of problem
e. _____ Restitution for vandalism
f. _____ A transfer from school or class
g. _____ Court action
h. _____ Other Specify _______________
i. _____ Seek help for offending party
j. _____ Clarify and drop pending charges or actions

6. How would you characterize your feelings toward the other party? (Check most appropriate)

a. _____ Anger, suspicion
b. _____ Fear of revenge, or other party's motives
c. _____ Not certain about it, but probably negative
d. _____ Anxious
e. _____ Guilt
f. _____ Vindictive
g. _____ Other, specify _______________

1b. Are you a

a. _____ Student
b. _____ Teacher
c. _____ Parent
d. _____ Admin.
e. _____ Other, specify _______________

3. Did you feel you had an opportunity to tell your side of the story?

a. _____ Very much
b. _____ Somewhat
c. _____ Less than somewhat and limited by who I was
d. _____ Not at all

5. Do you think the agreement reached realized or fit your intended accomplishment?

a. _____ Yes, a great deal
b. _____ Yes, somewhat
c. _____ I am not sure
d. _____ No, not at all
e. _____ Other, specify _______________

7. How would you characterize your feelings now toward the other party?

a. _____ Same
b. _____ Improved for better
c. _____ Changed but for worse
d. _____ Not certain, but probably better
e. _____ Not certain, but probably worse

8. How well do you think this agreement will work toward resolving your disagreement?

a. _____ A great amount
b. _____ Somewhat and a welcomed step
c. _____ Not certain, but probably little
d. _____ Not much at all

9. What attempts or actions were taken on your part to resolve this disagreement prior to today? (Check the most appropriate and most intense response)

a. _____ None
b. _____ Phone call discussions with student's parents
c. _____ Warnings in writing or conversation with social service or police
d. _____ Contacting school authorities
e. _____ Suspension from classes
f. _____ Attempt to physically avoid other party
g. _____ Home discipline
h. _____ Classroom punishment
i. _____ Court action
j. _____ Other, specify ______________________________

11. On the average, how many contracts per week did you have with the party you are in conflict with? (Write in numbers)

__________ __________

13. How well do you think you understand and can live by your agreement?

a. _____ All of it, and am ready to try
b. _____ Somewhat, but I am not clear about certain issues
c. _____ Not well, and suspect this will lead to problems
d. _____ Very little understanding since I contributed little and really didn't want to be here!
e. _____ Other, specify ______________________________

15. If you had another problem similar to the one you had, what would you do next time?

a. _____ Call police, family court
b. _____ Call the school/principal or call child's parents
c. _____ Call your attorney
d. _____ Forget about it
e. _____ Do same as the past
f. _____ Other, specify ______________________________

10. To what extent do you think this experience will influence your future behavior toward other party?

a. _____ Greatly, effect it, as set forth in agreement
b. _____ Somewhat, but never to the specific degree talked about today
c. _____ I don't know, but not much
d. _____ Not much because I don't think the agreement was realistic or applicable

12. Do you think your agreement will alter the amount of Contact you will have from now on?

a. _____ Yes
b. _____ No
c. _____ Don't know
d. _____ Other, specify ______________________________

14. How satisfied with the Mediation agreement were you?

a. _____ Very satisfied
b. _____ Satisfied
c. _____ Mostly satisfied
d. _____ Totally unsatisfied

16. Did you think the problem you had was

a. _____ Very serious
b. _____ Serious
c. _____ Not so serious
d. _____ No problem

17. Which of the following best describes your feeling toward the following: My Mediators handled the situation well

a. _____ I strongly disagree
b. _____ I disagree
c. _____ I agree
d. _____ I strongly agree

18. Which of the below choices best describes your feeling toward the following: My Mediators understood my problem.

a. _____ I strongly disagree
b. _____ I disagree
c. _____ I agree
d. _____ I strongly agree

19. Which of the below choices best describes feeling toward the following: My Mediators paid attention to me.

a. _____ I strongly disagree
b. _____ I disagree
c. _____ I agree
d. _____ I strongly agree

MEDIATION SUMMARY FORM

Case # ____________ Time Started ______

Date ____________ Time Ended ______

Panel Members: ____________________ ____________________

Complaint: ____________________ Respondent ____________________

What was (were) the underlying cause(s) of the dispute?

____

____

____

What was the level of tension between the disputants? How well did the panel handle this? ______________________

____

____

If you held more than one private session with each disputant, indicate how many and reasons for these sessions

____

____

Which parts of the session went well, which parts were rough? If rough, why? ______________________

____

How well did the panel work together? ______________________

____

Any additional observations on the process: ______________________

____

____

____

Resolved __ Unresolved __ Adjourned __ Complaint dropped __

Coordinating staff member: ______________________

Mediator
Summary Mediation Form (Revised)

Case # ______________

1. Explain or describe the immediate case (i.e., Truant, Harrassment, etc.) ______________________________

1b. Who, or whom does this case concern? ______________________________

2. Were there special problems in this case not typical to your experience? ____ Yes, ____ No, ____ Don't Know. If yes, explain ______________________________

3. In what school did this case arise? ______________________________

4. Based upon your participation, could you estimate the length of this problem? ____ Yes, ____ No, ____ Not Certain. If yes, how long? (approximately) ______________________________

5. Based upon your participation, did this case have a court petition prior to Mediation? ____ Yes, ____ No, ____ Not Certain. If yes, describe ______________________________

6. Based upon your participation, did this case have any police intervention prior to mediation? ____ Yes, ____ No, ____ Not Certain. If yes, describe ______________________________

7. Did this case require the intervention of school officials? ____ Yes, ____ No, ____ Not Certain. If yes, how often? (i.e., daily, weekly) ______________________________

8. Describe in your own words, with what frequency conflicting parties have contact? ______________________________

9. Did you feel the parties had regular contact with each other? ____ Yes, ____ No, ____ Don't Know. If no, explain ______________________________

10. What type of terms were agreed to by the complaining party(ies)? (Check where applicable)

a. _____ Comp to stop harrassment
b. _____ Parent to better monitor attendance of child
c. _____ Student or family to pay restitution to 3rd party other than resp
d. _____ Student to attend special program or attempt academic improvement
e. _____ Teacher-parent to improve communication
f. _____ Adult/parents to improve communications
g. _____ Specific restitution to school
h. _____ Specific restitution to individual
i. _____ Comp to restrict physical contact with resp
j. _____ Expressed intent that relationship terminated
k. _____ Class transfer
l. _____ School transfer
m. _____ Other, describe ______________________________

11. What type of terms were agreed to by the responding party(ies)? (Check where applicable)

a. _____ Comp to stop harrassment
b. _____ Parent to better monitor attendance of child
c. _____ Student or family to pay resittution to 3rd party other than resp
d. _____ Student to attend special program or attempt academic improvement
e. _____ Teacher-parent to improve communication
f. _____ Adult/parents to improve communications
g. _____ Specific restitution to school
h. _____ Specific restitution to individual
i. _____ Comp to restrict physical contact with resp
j. _____ Expressed intent that relationship terminated
k. _____ Class transfer
l. _____ School transfer
m. _____ Other, describe ______________________________

FOR OFFICE RECORDS USE ONLY

If Mediation conducted in part or totally, what was case outcome?

_____ Resolved formally
_____ Resolved prior to actual Mediation
_____ Parties withdrew their claim during Mediation
_____ Parties refused to sign agreement
_____ Other

Mediation agreement date ______________ ______________

Names of Mediators in attendance ______________________________

____

Mediator Certification

This is to certify that ______________________________

HAS SATISFACTORILY COMPLETED THE TWENTY-FOUR
HOUR MEDIATOR TRAINING COURSE CONDUCTED BY

the **Community Mediation Center, Inc.**

at **Middle Country Central School District**

FROM ______________ THROUGH ______________

AND HAS TAKEN AN OATH OF CONFIDENTIALITY AND IS NOW QUALIFIED TO MEDIATE
INTER-PERSONAL DISPUTES FOR MIDDLE COUNTRY CENTRAL SCHOOL DISTRICT

GRANTED THIS DAY ,198

____
Executive Director

____
Deputy Director

____
District Coordinator

APPENDICES

EXTRACTS FROM: **ALTERNATIVE METHODS OF DISPUTE SETTLEMENT—**
A Selected Bibliography

ABA Committee on
Resolution of Minor Disputes

Compiled by
Frank E. A. Sander
and
Frederick E. Snyder

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1982 UPDATE

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Pickrell, Robert W. and Alice L. Bendheim. "Family Disputes Mediation - A New Service for Lawyers and Their Clients." *Barrister*, V. 7, n. 1 (Winter 1980), pp. 27-28. Also in *Arizona Bar Journal* (October 1979).

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ANNOTATED BIBLIOGRAPHY OF SELECTED ARTICLES ON FAMILY MEDIATION

- Compiled by Katherine Sheehey,
Lesley College, Cambridge, MA
(A Spring 1982 Washington Semester Intern with the National Legal Resource Center for Child Advocacy and Protection)

Bahr, Stephen J. "Mediation is the Answer." Family Advocate, Vol. 3, No. 4, Spring 1981, p.

Based on the premise that adversary procedure in divorce litigation actually increases the degree of conflict and divisiveness between parties, private mediation is becoming recognized as a possible alternative to traditional divorce procedure. However, evaluative information is not available in large or conclusive amounts. This article summarizes results of an evaluation of private mediation services in Fairfax County, Virginia. The sample for this study consisted of two groups of individuals who had experienced the divorce process. The "mediated" group was comprised of nineteen individuals who had participated in the Family Mediation Service of McLean, Virginia during 1977 and 1978. The "non-mediated" group consisted of sixty individuals whose names were obtained from court records. The method of collecting data occured through telephone interviews. The criteria for evaluation were divided into three categories: (1) monetary cost; (2) fairness; and (3) client satisfaction. Results of this evaluation led to conclusions that the individuals who used private mediation, in contrast to those who did not: (1) found their monetary cost to be less; (2) were much more likely to experience fairness in the property and monetary settlements; and (3) were more likely to be satisfied with the final decisions of the entire divorce process. Specific breakdown and statistical data of responses are provided. Four policy recommendations in support of private mediation as an alternative to adversary procedures are presented: (1) law schools and bar associations should provide mediation training through the availability of courses and workshops; (2) state bars should recommend or require a certification in family law for domestic relations attorneys; (3) bar association Codes of Legal Ethics should express support for the value of mediation in appropriate cases; and (4) institutions educating counselors and other human service workers should also require training in family law and finances.

Coogler, O. J., Weber, Ruth E., and McKenry, Patrick "Divorce Mediation: A Means of Facilitating Divorce Adjustment." Family Coordinator, Vol. 28, April 1979, P. 255.

Mediation is a process which utilizes cooperation and conflict resolution skills. This article presents a description of the family mediator as well as guidelines for deciding financial and custody issues. Traditionally, judges and lawyers are able to serve couples only in areas of litigation. Mediation offers an alternative approach to the adversary process. The goal of family and divorce mediation, according to the Family Mediation

Association, is to help the couple in reaching acceptable compromises in a rational and responsible way. The Family Mediation Association model is explained and a discussion of applicability to clients is included. Also presented and illustrated are the advantages mediation offers couples, professionals, and society.

Harbinson, Kimberly Taylor. "Family Law - Attorney Mediation of Marital Disputes and Conflict of Interest Considerations." North Carolina Law Review, Vol. 60 (October 1981), p. 171.

The concern over the conflict of interest issues in the implementation of divorce mediation is a current consideration of members of the legal profession. An increased use of mediation has arisen from public interest and demand, especially in light of the no-fault divorce laws. Fault has become an issue used only in decisions concerning support, custody, and property division. Although there is a growing need for attorneys to participate as mediators in the divorce process, there is a noted reluctance on the part of lawyers to initiate an involvement in mediation. Several reasons for this sentiment are discussed. First, the role of the mediator digresses somewhat from that of the traditional adversary attorney. Second, attorneys may feel they are violating the "conflict of interest" provisions of the American Bar Association's Code of Professional Responsibility. This concept is expanded, in reference to the role and function of the attorney-mediator. The author also examines Ethical Consideration (EC) 5-20 of the ABA Code, as well as the ABA Proposed Model Rules of Professional Conduct. The author concludes that divorce mediation is a permissible and desirable role for attorneys. Ethical responsibilities, however, are an important consideration as is the attorney's willingness to deviate from the traditional role of the attorney.

Harris, Marlys. "Divorce's Friendly Persuaders." Money, Vol. 9, No. 4, April 1980, p. 45.

Mediation is presented as a less costly and more beneficial alternative to the traditional adversary divorce process. It is defined as a combination of labor negotiation and social work in which both spouses actually become responsible in the process ensueing separation agreements. This article cites the monetary, efficiency, and personal benefits mediation offers the divorcing couple. Family courts, the American Arbitration Association, and trained professionals are identified as offering mediation services. A cost breakdown (per session) comparing each of these services is provided. An explanation of the divorce mediation process is given using the O.J. Coogler model. This includes states of the process as well as the mediator's role as an objective third party. This model includes implementation of arbitrators in cases in which an impasse is reached. The article also focuses on several "worrisome aspects" of divorce mediation. First, there is a general assumption that both parties enter the mediation process on an equal level. Second, is the danger that an attorney unsympathetic to mediation will reopen the negotiations. Suggestions and advice on locating and evaluating mediation services are offered.

Haynes, John M. "Divorce Mediator: A New Role" Social Work, Vol. 23, No. 1, Jan. 1978, p. 5.

The social worker possesses certain skills which enable him/her to function effectively as a divorce mediator. The social worker, in contrast to the attorney, is trained in dealing with the emotional aspects of divorce and can therefore serve to make divorce as painless as possible while assisting the couple in reaching a final settlement. This article offers a concept of divorce mediation modeled after that of labor mediation. The role of the social worker is to act neutrally in guiding the parties toward seperating emotional issues from non-emotional issues in reaching an agreement. However, an important consideration is the social worker's ability to utilize theraputic skills, rather than actual therapy in mediation situations. This point is important in the areas of the mediation process, referral, and consultation. Although the attorney remains responsible in drafting the final agreement and obtaining the divorce decree, the social worker is helpful in preparing the couple for the present and future emotional, personal aspects of the divorce.

Jenkins, John A. "Divorce California Style," Student Lawyer, Jan. 1981, p. 31.

The state of California has been a forerunner in progressive divorce laws. It has also become progressive in the implementation of mediation to resolve divorce issues. State law which requires counties to establish conciliation courts is explained and speculated as a possible model for other states. Mediation is defined as an attempt to bring disputing couples into bargaining positions and encourage them to communicate in reaching their final settlement. A counseling service of Los Angeles County Conciliation Court highlights several of the advantages of mediation. Jessica Pearson of the University of Denver is also cited in support of mediation programs. Examples of couples' conflicts which experienced mediation are presented. The decision whether to mediate on both individual and joint bases is discussed. The mediator does not replace the attorney or financial advisor. Rather, he/she serves as an impartial aid to the couple in settling their differences, reaching an agreement, and opening communication. Discussion of private mediation services and their different forms is presented in contrast to court mediation services. Several disadvantages to mediation and the legal profession are also considered.

Meroney, Anne E. "Mediation and Arbitration of Separation and Divorce Agreements." Wake Forest Law Review, Vol. 15, No. 4, August 1979, p. 467.

Various domestic dispute resolution techniques are currently in practice. This article examines these processes and discusses the question of whether contracts devised to mediate and arbitrate divorce and seperation agreements should be enforceable. Two significant movements over the past twenty years in the area of divorce reform are cited. The proposals for state family court systems and elimination of the fault concept are reflections of progressive attitudes toward divorce. The author provides support for mediation as an alternative through providing criticisms of the judicial system. Mediation and arbitration are defined in terms of purpose and function. Conditions for the use of each are explained. Mediation is presented as an aid to negotiation while arbitration is defined as an alternative to litigation. The Family Mediation Association model is presented as a procedural outline of the mediation process.

Pearson, Jessica and Theonnes, Nancy. "Mediation & Divorce: The Benefits Outweigh the Cost," Family Advocate, Vol. 4, No. 2, Winter 1982, p. 26.

'Mediation is presented as a less costly procedure for settling divorce and child custody matters. This article summarizes a study performed by the Denver Custody Mediation Project. The purpose of the study was to analyze and compare savings of time, cost, misunderstanding, and dissatisfaction of those couples who participated in mediation and those who experienced the adversary system. Three randomly assigned study groups were formed from judicial referrals. They were labeled: (1) mediation group (which included two subdivisions, "successful" and "unsuccessful"); (2) control group (which was comprised of those who participated in adversary procedures); and (3) reject group (which included those formerly assigned to the mediation group, however denied mediation services). Members of each group were interviewed periodically at specific stages in their particular procedures. A statistical breakdown of responses is illustrated. Results of the study indicate that mediation is a more desireable manner by which to settle custody disputes. Support for this conclusion is provided through explanation of each group's responses.

Pickrell, Robert W. and Bendheim, Alice L. "Family Disputes Mediation - A New Service for Lawyers and their Clients," Arizona Bar Journal, Vol. 15, No. 3, October 1979, p. 33.

Mediation, as a method of settling family and divorce disputes, is presented as a constructive way to deal with issues of child custody and visitation. Mediation is effective in relieving the tension and decreasing the hostility associated with these matters. The authors cite trust in the mediator as the most important factor in the success of the process. Mediation is distinguished from arbitration in both its use and function. Discussion of the mediation service of the American Arbitration Association is included. Mediation, however, should not be considered substitution for legal counsel or financial advice, nor is it appropriate for all couples. The mediator serves as an independent party assisting both parties in reaching an acceptable agreement. Those who typically serve as mediators include attorneys and psychologists, however not in theraputic ways.

Vroom, Patricia; Fasset, Diane, and Wakefield, Rowan A. "Winning Through Mediation: Divorce Without Losers." Futurist, Vol. 16, No. 1, February 1982, p. 28.

In determining matters of property distribution, support, and child custody, divorce mediation is presented as a beneficial alternative to the adversary system. Parties experience savings of time, cost, and hostility as well as gaining skills in communication and problem solving within the family. The mediation process differs from that of the adversary in that it produces a more informal, less structured and open climate. The disputants, with the guidance of the mediator (defined as an impartial third party), retain control over the final outcome of the divorce procedure. Divorce mediation is consistant with the ideal of the family as a unit. The divorcing family is a "family in transition" and mediation is a process which deals with subsequent issues. This new approach is also functional in regard to judicial overload. The popularity of divorce mediation is explained by the desire of professionals and divorcing parties to "re-humanize" dispute resolution proceedings. Mediation is also cited as a suitable procedure in dealing with other family conflicts (i.e., runaways, domestic violence, parent-child conflicts, etc.). The authors also point out the diversity of individuals who are able to serve as mediators on both a volunteer and professional bases.

Winks, Patricia L. "Divorce Mediation: A Nonadversary Procedure for the No-fault Divorce," Journal of Family Law, Vol. 19 (1980-1981), p. 615.

Although the implementation of no-fault divorce laws evidences the progressive attitudes toward divorce, the procedure remains adversary. Mediation is considered an alternative approach in settling divorce disputes. A history of legal and social perspectives toward divorce is illustrative of the emergence of no-fault divorce, as nonadversary law in which adversary procedure was still evident. Legal intervention on behalf of the individual divorcing parties led to their removal from the actual conflict. Divorce law which is nonadversary both legally and procedurally may present some problems in the areas of pro se divorce, one-sided representation and dual representation. Divorce mediation is suggested as a feasible alternative to these procedures. The mediator is defined as representing neither party, but providing the necessary legal information helpful to them in reaching a fair settlement. A breakdown of divorce mediation procedure is provided. Characteristics desirable for a successful mediator are discussed.

Wiseman, Janet Miller and Fiske, A. John. "A Lawyer - Therapist Team as Mediator in a Marital Crisis." Social Work, Vol. 25, No. 80, Nov. 1980, p. 442.

The use of mediation in no-fault divorce cases benefits both parties by creating a supportive, neutral, and communicative environment. Despite the varying techniques used in mediation, the common goal is toward mutual interest, increased communication, and peaceful resolution. The lawyer - therapist team can be a great asset to the mediation process through a synthesis of the specialized skills of the attorney and social worker. The attorney's primary function, as the impartial mediator, is to provide the divorcing parties with legal information pertaining to no-fault divorce. The social worker, in a consultant role, receives information from the attorney concerning the couple, from which is formed a hypothesis about the breakdown of the marriage. The combined purpose of the lawyer-therapist team is to aid the couple in achieving an improved understanding of the marital crisis. Justification both for and against divorce action is included and examined. Contributing factors to the divorce decision are identified and explained. A mediation model of three stages is proposed and exemplified. Through encouraging the couple to be involved in the divorce process, both parties gain a better awareness of the marital conflict and an increased ability to evaluate decisions in their own situations.

LIST OF OTHER ABA MATERIALS

National Legal Resource Center for Child Advocacy and Protection

A Program of the Young Lawyers Division of the American Bar Association

1800 M Street, N.W.
Washington, D.C. 20036
(202) 331-2250

Publications List

In keeping with the Resource Center's objectives to increase professional awareness and competency of the legal community in the area of child welfare issues, the Resource Center has developed the following publications:

CAP 1 *Protecting Children Through the Legal System*—An ABA National Institute Manual (A comprehensive book covering legal issues related to child maltreatment, state intervention, and permanency planning)—$25.00

CAP 2 *National Guardian Ad Litem Policy Conference Manual* (Report, papers and other materials from the first National Guardian *Ad Litem* Policy Conference)—$15.00

CAP 3 *Child Abuse and Neglect Litigation: A Manual for Judges* (Focuses on the practical aspects of the judge's work in these cases)—Available only to judges, court administrators, and organizations involved in judicial training—Free

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